Supreme Court, U.S.
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In the

Supreme Court of the United States

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande; MUNICIPALITY OF SABANA GRANDE,

Petitioners,

v.

SANTOS RIVERA-TORRES; DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court retained jurisdiction over the case while appellants' interlocutory Forsyth appeal was pending before the Court of Appeals absent an Apostle certification that the appeal was frivolous.

2. Whether the First Circuit properly held that the district court's pretrial denial of qualified immunity based on the existence of an unresolved controversy of fact regarding defendant's motivation is an unappealable order because the state of mind element of the underlying constitutional claim merges with the qualified immunity inquiry.

3. Whether a reasonable officer in the Mayor's position would have understood that the decision to defer acceptance of a letter of resignation pending a personnel investigation pursuant to state law would violate the employee's clearly established rights.

4. Whether the deferred acceptance of a public employee's letter of voluntary resignation pending a personnel investigation into unauthorized absences pursuant to state law constitutes a municipal law, policy or custom in violation of that employee's constitutional rights.

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The opinion of the United States Court of Appeals for the First Circuit was entered on August 26, 2003 and is reported at 341 F.3d 86 (1st Cir. 2003). The order denying the petition for rehearing and for rehearing en banc was entered on September 23, 2003 and is not reported. The memorandum opinion and order of the district court for the District of Puerto Rico (App. 1a-24a) was entered on November 26, 2002 and is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was issued on August 26, 2003 and the timely petition for rehearing and suggestion for rehearing en banc was denied on September 23, 2003. Subject matter jurisdiction for the United States District Court for the District of Puerto Rico was invoked through 42 USC § 1983. Subject matter jurisdiction for the Court of Appeals for the First Circuit was invoked through 28 USC § 1291. This Court has jurisdiction over this petition under 28 USC § 1254(1).

RELEVANT PROVISIONS

See appendix page 39a.

STATEMENT

A. General Background

In 1980, Respondent Santos Rivera-Torres

began working for the Municipality of Sabana Grande and on January 1, 1982 became a career, or civil service, employee. He was later transferred to the position of "In Charge of the Gymnasium". In November 1998, Respondent publicly switched parties and announced his intent to run for Mayor on behalf of the New Progressive Party (NPP) in the 2000 general elections thus challenging his employer, the incumbent Mayor, Petitioner Miguel Ortiz-Velez of the Popular Democratic Party (PDP).

Respondent alleged that in 1999, as a result of his challenge to the Petitioner for the office of Mayor, he was stripped of his duties as a municipal employee, subjected to supervision by a fellow employee, deprived of a telephone line and suspended for insubordination and abandonment of his workplace, a sanction which ultimately was reversed by the state Personnel Administration Systems Appeal Board.

During the first five months of 2000, Respondent was absent 63.5 days. In May 2000, by letter directed to Mayor Ortiz, he requested a transfer to a state-level temporary appointment with the Commonwealth Department of Sports and Recreation. No action was taken upon the request. On June 5, 2000, Respondent submitted an irrevocable letter of resignation from his civil service position with the Municipality. At that time, Petitioner Mayor Ortiz refused to accept Respondent's resignation, citing in a letter directed to the Respondent an ongoing administrative investigation into the his excessive absenteeism. In the course of the investigation, Respondent's physician certified that his condition required two to three days of bed rest. On November 7, 2000, Petitioner Mayor Ortiz was re-elected and ultimately accepted Respondent's irrevocable letter of resignation on

November 13, 2000.

On February 28, 2001, Rivera-Torres instituted the present action pursuant to 42 USC § 1983 alleging violation of his First Amendment political rights.

B. Procedural Background

On November 26, 2002, one business day prior to the scheduled trial date, the district court granted partial summary judgment to defendants, dismissing the claims against co-defendant Sammy Vega and dismissing all of Plaintiff's allegations as time-barred except for (1) the Mayor's refusal to approve Rivera-Torres' transfer to the Commonwealth's Sports and Recreation Department and (2) the Mayor's deferral of acceptance of Rivera-Torres' letter of resignation. The district court found that Respondent had sustained his burden of proof to establish Petitioner's political animus where the Plaintiff and Defendant were political opponents; the political campaign was sensationalistic; and Petitioner Mayor Ortiz stated publicly that he would not accept the resignation of the Rivera-Torres because was he was under investigation for excessive sick leaves and stating that Rivera-Torres was "a crook." (App. 19a-20a) The District Court also held that since the Mayor and Municipality "have not foreclosed the possibility that Plaintiff's political affiliation was a substantial or motivating factor in Defendant's decision to decline and defer Plaintiff's resignation" it could not grant summary judgment on the basis of Defendant's Mt. Healthy defense. (App. 20a).

Petitioner Mayor Ortiz had also moved for summary judgment on the basis of qualified immunity

arguing that a reasonable official would not have understood that investigating an employee who was absent 63.5 days in five months before accepting his voluntary resignation would violate the employee's constitutional rights. The district court denied Petitioner's assertion of qualified immunity stating that Respondent made out a claim for a constitutional violation, that the right to be free from politically-motivated personnel actions was clearly established and that there remained an unresolved issue of material fact as to Mayor Ortiz' motivation for investigating Respondent's absenteeism, not approving Respondent's request for a transfer out of the Municipality and deferring acceptance of Respondent's subsequent resignation.

On December 2, 2002, just one business day after the entry of the district court's summary judgment order, the Defendants filed a notice of appeal of the interlocutory opinion and order denying Mayor Ortiz' motion for summary judgment on the basis of qualified immunity; a motion requesting stay of the proceedings in light of the interlocutory appeal and a motion to continue the jury trial scheduled for that same day because the Defendants' attorney was in the middle of trying a lengthy, multiparty federal jury trial before District Court Judge Pieras. The district court did not rule on these motions but instead pressed on with trial on December 3, 2002 after sanctioning Defendants' counsel of record for her failure to begin trial on December 2, 2003.

On December 9, 2002, after a four day trial, the jury returned with a verdict for Respondent, awarding him $60,000 in back pay, $125,000 in compensatory damages and $250,000 in punitive damages. On the derivative state claims of Rivera-Torres' family, the

jury awarded $75,000 in compensatory damages to his wife, and $30,000 in compensatory damages each of his two daughters. The jury absolved the Municipality of Sabana Grande of all liability; the district court subsequently entered judgment against the municipality as a matter of law and reduced the jury's back pay award. (App. 32a-38a). On December 20, 2002, the district court notified the parties of its order dated December 6, 2003 denying Defendants' motion to stay the proceedings and certifying Defendants' interlocutory appeal as frivolous because there was a question of material fact as to Defendant Ortiz' actual motivation in carrying out the challenged personnel actions. (App. 25a-31a). It is not apparent from either court docket that the district court ever transmitted its "certification" to the Court of Appeals. On August 26, 2003, a panel of the Court of Appeals for the First Circuit held that Defendants' interlocutory appeal challenging the district court's denial of qualified immunity never divested the district court of jurisdiction because Petitioners sought to challenge an unappealable order. Rivera-Torres v. Ortiz, 341 F.3d 86 (1st Cir. 2003)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE AVAILABILITY OF APPELLATE JURISDICTION WHERE THE DISTRICT COURT DENIES A PRETRIAL ASSERTION OF QUALIFIED IMMUNITY ON THE BASIS OF A PERCEIVED ISSUE OF FACT AS TO THE DEFENDANT'S MOTIVATION.

Public officers acting in their official capacities are shielded from individual liability for civil damages for conduct which does not violate clearly established rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Since Mitchell v. Forsyth, 472 U.S. 511 (1985), this Honorable Court has established that a district court's denial of summary judgment on a claim of qualified immunity is subject to immediate appeal pursuant to 28 USC § 1291 under the collateral order doctrine enunciated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) because entitlement to qualified immunity involves the purely legal and independent question of whether the allegations support a claim of clearly established law. Mitchell, 472 U.S. at 528 n.9. Ten years later, the Court in Johnson v. Jones, 515 U.S. 304 (1995) clarified that a summary judgment order which determines that the pretrial record sets forth a genuine issue of fact for trial, even in the context of qualified immunity, is not immediately appealable. 515 U.S. at 319-320. This holding was thereafter limited by Behrens v. Pelletier, 516 U.S. 299 (1996) in which the Court cautioned against misreading Johnson as creating a bright-line rule precluding appellate review over the denial of qualified immunity whenever there are controverted issues of material facts, stating that the denial of summary judgment often includes such a determination. 516 U.S. at 312-13.

Many circuit courts have held that interlocutory review of a denial of qualified immunity is available even where the denial is premised on the existence of a disputed issue of material fact. See, e.g. Jeffers v. Gomez, 267 F.3d 895, 903 (9th Cir. 2001) ("Even if disputed facts exist about what actually occurred, a defendant may still file an interlocutory appeal if the

defendant's alleged conduct in any event met the standard of objective legal reasonableness under clearly established law regarding the right allegedly infringed."); Farmer v. Moritsugu, 163 F.3d 610, 614 (D.C. Cir. 1998) (appellate jurisdiction exists where the defendant contests only whether those facts alleged by plaintiff could support a conclusion that he violated the plaintiff's constitutional rights); Winfield v. Bass, 106 F.3d 525, 530 (4th Cir. 1997) (en banc) ("We have jurisdiction over a claim that there was no violation of clearly established law accepting the facts as the district court viewed them."); Salim v. Proulx, 93 F.3d 86, 89 (2nd Cir. 1996) ("a district court's mere assertion that disputed factual issues existed is not independently sufficient to preclude an immediate appeal) and Poe v. Leonard, 282 F.3d 123, 132 (2nd Cir. 2002) (where the facts that bear on the circumstances are not in dispute, the objective reasonableness of the defendants' actions should be determined as a matter of law and appellate jurisdiction lies); Colston v. Barnhart, 146 F.3d 282, 284 (5th Cir. 1998) (no appellate jurisdiction exists to review a district court's determination that the issues of fact in question are genuine but a review will lie to determine whether those issues are material to the defense of qualified immunity).

Other circuits however have created a bright-line rule that the rejection of qualified immunity which turns on an issue of fact as to the defendant's state of mind is not immediately appealable. See, e.g. Hoover v. Radabaugh, 307 F.3d 460 (6th Cir. 2002) (appellate review not available when the district court makes "a factual determination that there was a genuine issue of material fact as to whether or not defendants entertained unconstitutional motivations in discharging

a public employee"). The First Circuit in the decision below distinguishes between "constitutional violations that are strictly a product of the perpetrator's actions, and offenses where the perpetrator's subjective intent is an essential element of the violation." Rivera-Torres v. Ortiz, 341 F.3d 86, 24 (1st Cir. 2003). The Rivera-Torres panel held that whereas in the former circumstance, usually in the context of a Fourth or Fifth Amendment violation, this Court's precedents "sensibly exclude evidence of the officer's intent from the qualified immunity analysis," in a political discrimination case "the employer's subjective motive is an essential element of the constitutional violation itself, and cannot be divorced from the qualified immunity inquiry." 341 F.3d at 26. Therefore, in the First Circuit, at least according to the Rivera-Torres panel, where the district court denies summary judgment in a political discrimination case on the basis of qualified immunity because the defendant's actual motive is unresolved, but no other factual dispute remains, such an order is unappealable in its entirety and a defendant's attempt to seek appellate review would never divest the district court of jurisdiction.

The position of the First Circuit is at odds with this Honorable Court's holding in the case of Griggs v. Provident Consumer Discount Co. that the "filing of a notice of appeal is an event of jurisdictional significance -- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." 459 U.S. 56, 58 (1982). The aforementioned divestiture rule operates the same way whether the appeal is from a final judgment or from an interlocutory denial of a plea for qualified immunity. In Mitchell v. Forsyth, 472 U.S. 511, 526 (1985), the Supreme Court recognized that a

public officer who is denied the protection of qualified immunity at the pretrial stage, may file an interlocutory appeal. Appellate jurisdiction arises from the moment that qualified immunity is denied. Langely v. Adams County, 987 F.2d 1473, 1479 (10th Cir. 1993) Nevertheless, Courts have recently crafted an exception to the divestiture rule by developing the so-called frivolity doctrine.

Courts have been wary of the potential for defendant officials to abuse the Forsyth interlocutory review mechanism by customarily seeking appellate review of the pretrial denial of qualified immunity, even in patently unmeritorious cases, with the sole purpose of stalling litigation. In 1989, the Seventh Circuit developed a procedure to put a stop to meritless appeals in the case of Apostol v. Gallion, 870 F.2d 1335, 1338-39 (7th Cir. 1989), wherein the appellate court held that a district court may certify to a Court of Appeals that an interlocutory, immunity-based appeal is frivolous and upon such certification, proceed to trial. The Apostol certification mechanism has been formally adopted and refined by every single Circuit Court confronted with it, except for the First Circuit. See Yates v. Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992); Stewart v. Donges, 915 F.2d 572, 576-77 (10th Cir. 1990); Rivera-Torres, 341 F.3d at 22. In the Second, Fourth and Eleventh Circuits, although there has been no formal adoption of the certification proceeding, District Courts within those Circuits have addressed the issue. These decisions include: Andre v. Castor, 963 F. Supp. 1169, 1170-71 (M.D. Fla. 1997) (recognizing the power of a district court to certify but refusing to do so); Thompson v. Farmer, 945 F. Supp. 109, 112, 113 (W.D. NC 1996) (declining to certify); Bean v. City of

Buffalo, 822 F. Supp. 1016 (W.D. NY 1993) (certifying defendant's appeal as frivolous).

Despite the panel's stated refusal to adopt the Apostol certification process, the First Circuit does indeed routinely advise the district courts in the District of Puerto Rico to certify interlocutory appeals as frivolous if the denial of qualified immunity turned on an unresolved issue of fact. In at least three different cases currently pending before the district courts, the First Circuit denied petitions to stay proceedings and outright denied an interlocutory appeal on the sole basis of the district court's certification that the appeals were frivolous. See, e.g. Edgardo Santiago-Ramos, et al v. Roberto González-Navarro, et al, Case No. 02-1921 and Rodríguez-Vázquez, et al v. López Martínez, et al, Case No. 02-2001, unpublished. Therefore, it would be more accurate for the First Circuit to state that it has not **formally** adopted the Apostol certification process nor any guidelines for litigants or district court judges in certifying interlocutory appeals as meritless; but the First Circuit does indeed utilize and base its decisions as to jurisdiction upon the certification of a district court.

Although this Honorable Court has never squarely ruled on the appropriateness of the certification mechanism developed by the Seventh Circuit, the Behrens Court did mention in dicta the availability of district court certification. 516 U.S. at 310-11 ("This [certification] practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings"). As applied by the Circuit Courts, certification does not sound the death knell for

defendants' appeal; this was explained by the Tenth Circuit in Langely v. Adams County, 987 F.2d 1473, 1477 (10th Cir. 1993), wherein the Court ruled:

> Once a district court so certifies a qualified immunity appeal as frivolous and thus regains jurisdiction, that does not affect our jurisdiction. Rather, both the district court and court of appeals shall have jurisdiction to proceed. Thus the defendant is entitled ultimately to appellate review.

The procedure for issuing certification varies among the Circuits that have adopted it. For example, the Tenth Circuit requires the celebration of a hearing before a certification of frivolity may issue. Stewart v. Donges, 915 F.2d 572, 576 (10th Cir. 1990). In the case of McMath v. City of Gary, 976 F.2d 1026, 1031 (7th Cir. 1992), the Seventh Circuit, which decided Apostol, observed:

> Mitchell v. Forsyth, authorized pre-trial appeals for defendants claiming qualified immunity; that right would be eviscerated if district courts, cloaked with the authority of Apostol, could too easily certify even potentially meritorious appeals as frivolous. The stamp of frivolity should only be used when a Forsyth appeal is "unfounded." (Citations omitted)

Clearly, certification is the only means by which a district court may proceed to trial when faced with a timely filed Forsyth appeal. Not a single circuit court opinion on certification has addressed the validity of retroactive use of this mechanism. Moreover, the general rule in certification cases is that the plaintiff

must first move the district court for certification.

Furthermore, a certification of frivolousness cannot be founded in a void but must rather be based on a legitimate reason why the appeal is frivolous. Frivolousness arises when the appeal raises no colorable issues. May v. Sheahan, 226 F.3d 876, 881 (7th Cir. 2000). The district court's proffered motive for placing the frivolous label upon the Petitioner's appeal is the same reason advanced for the rejection of the qualified immunity defense at the summary judgment stage, namely that "there was a question of material fact as to whether Defendant Ortiz' decisions concluding with plaintiff's resignation were motivated by political animus." (App. 28a). The notion that the subjective element of intent is part of the qualified immunity inquiry was dispelled by the Supreme Court in the case of Crawford-El v. Britton, 523 US 574, 588-89 (1998), wherein it was clarified:

> Under that standard, a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense.

In Stewart, the Tenth Circuit panel declared that the trial proceedings carried out by the district court for the District of New Mexico were void for lack of jurisdiction. As in the instant case, in Stewart the district court chose to proceed to trial despite a pending interlocutory appeal, failed to certify the appeal as frivolous and was never moved by plaintiffs to provide such remedy; consequently its ultimate failure was in not avoiding an enormous waste of judicial resources In declaring the nullity of the judgment entered after

trial, the Stewart Court ruled:

> [B]ecause the district court made no certification that the defendant's appeal... was frivolous or forfeited, the district court was automatically divested of jurisdiction. Because the subsequent trial was conducted without jurisdiction, the court's judgment is without effect. [W]e hold that the district court correctly denied the defendant's motion for summary judgment due to a dispute of material fact, and thus we must remand for further proceedings.

As a matter of law, certification is a matter to be handled in first instance by the district court, a function that may not be delegated to the Court of Appeals. In Yates v. City of Cleveland, 941 F.2d 444, 449 (6th Cir. 1991), the Sixth Circuit restated the validity of the Apostol certification scheme but refused to dispose of the appeal on the grounds of frivolousness because the district court failed to make any ruling on the matter. It is only after a certification of frivolousness has been duly addressed to the Court of Appeals that such Court may reassess the issue and pass judgment on whether the appeal is indeed frivolous. See, e.g. Marks v. Clarke, 102 F.3d, 1012, 1018 (9th Cir. 1996) ("if the district court deems the appeal frivolous and the court of appeals agrees, the appeal can be disposed of summarily"). It is therefore essential that not only that an appeal be categorically labeled as frivolous by the district court but that such a certification be timely forwarded to the Court of Appeals so such a determination be adequately accepted or rejected. As the docket in the instant appeal reveals, the district court's Certification Order was never brought to the

attention of the Court of Appeals.

The procedural conundrum below did not go unnoticed by the First Circuit panel. Indeed, the panel stated that had the district court ruled on Petitioners' motion to stay prior to commencing the jury trial, its jurisdiction over the proceedings would have been clearly established; nevertheless, the panel went on to hold that, given that the standard for obtaining a stay of the proceedings depends on a movant's showing of success on the merits of the appeal, the formal adoption of Apostol's certification procedure for frivolousness is unnecessary. Rivera-Torres v. Ortiz, 341 F.3d 86, 21-22 (1st Cir. 2003). Thus, in the First Circuit, a defendant official seeking interlocutory review of his right to qualified immunity in a political discrimination case must first establish the probability of success on the merits of the appeal by motion to the district court.

In the instant case, as in Stewart, neither plaintiffs nor the Court itself did anything to recover the jurisdiction lost upon the filing of our Notice of Appeal. The district court in this case proceeded to trial despite the fact that a Forsyth appeal had been filed and without issuing a certification of frivolity. The Court of Appeals never relinquished jurisdiction over the interlocutory appeal, but eventually validated the district court's decision to proceed to trial by formally rejecting the doctrine set forth in Apostol. The First Circuit's rejection of Apostol was not followed by an explanation as to how, if in any way, the divestiture rule can be reconciled with the procedural history of the instant case. Thus, the validation of the district court's decision to proceed to trial in the case at bar, absent a timely certification of frivolousness, is both, at odds with the Supreme Court precedent set forth in Griggs and with the circuits that have adopted Apostol.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE ROLE OF SUBJECTIVE INTENT IN THE QUALIFIED IMMUNITY ANALYSIS WHERE INTENT IS AN ESSENTIAL ELEMENT OF THE UNDERLYING CLAIM AND BECAUSE THE RULE OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT THAT INTENT CANNOT BE DIVORCED FROM THE QUALIFIED IMMUNITY ANALYSIS IN POLITICAL DISCRIMINATION CASES SUBSTANTIALLY DEPARTS FROM THIS HONORABLE COURT'S DECISION IN CRAWFORD-EL V. BRITTON.

The merits of the qualified immunity pleas of Petitioner Ortiz have never been heard, neither by the lower nor the intermediate tribunals. The sole reason for this is that the district court found that there was a factual dispute as to whether defendant's subjective motivations were moved by partisan politics. The qualified immunity standard envisioned in Harlow v. Fitzgerald, 457 U.S. 800, 817-818 (1982), provides for an evaluation of objective reasonableness through a single objective element, whether or not the current legal understandings gave the officer involved reasonable notice that his/her conduct would result in a constitutional violation. The introduction of this single objective standard for assessing immunity represented a change in the doctrine of official immunities, which previously required the existence of a subjective component of "good faith". This evolution was fully discussed by the majority in the case of Crawford-El v.

Britton, 523 U.S. 574, 587-588 (1998), in which it held:

> [A] defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense.

Despite the clarity of this Court's decision in Crawford-El, the First Circuit in the opinion below limited the scope of Crawford-El to claims for the violation of constitutional rights of which motivation is not an element. See Tower v. Leslie-Brown, 326 F.3d 290, 296 (1st Cir. 2003); Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001). Defendants in the First Circuit asserting qualified immunity in cases in which motivation is an element of the underlying claim (e.g. First Amendment protected speech) are not entitled to a merits review of their plea for immunity upon a finding by the district court that the subjective state of mind of the officer cannot be adjudicated by way of summary judgment. Acevedo-García v. Vera-Monroig, 204 F.3d 1, 11 (1st Cir. 2000) (reaching an interpretation of Crawford-El, based on the Court's construction of the Chief Justice's dissent, without making any reference to the holdings of the majority). This reasoning has the effect of creating at least two separate and distinct qualified immunity tests, one for intention-based violations and a different one for violations in which motivation is not an element. Notably, in the recent opinion Fabiano v. Hopkins, 2003 U.S. App. LEXIS 24690 (1st. Cir. Mass. Dec. 9, 2003), a panel for the First Circuit determined that Defendant officers were entitled to qualified immunity on a free speech retaliation in employment claim despite the

unresolved question of motive, an essential element of Plaintiff's claim; it appears that the First Circuit distinctions between qualified immunity claims goes so far as to place political discrimination claims in a sub-category of intent-based claims requiring special analysis.

This distinction drawn by the First Circuit in the opinion below is blatantly inconsistent with this Court's determination that qualified immunity was to apply "across the board" without regard to the "precise nature of various officials' duties **or the precise character of the particular rights alleged to have been violated.**" Anderson v. Creighton, 483 U.S. 635, 642-643 (1987). Despite the fact that this Honorable Court has always held that the standards for assessing qualified immunity and the merits of any given constitutional claim are analytically distinct, the First Circuit merges the two inquiries such that summary judgment on the basis of qualified immunity is virtually impossible where motive is an essential element of the underlying constitutional claim.

The Second and Sixth Circuits have joined the First Circuit's qualified immunity merger theory of motive. Locurto v. Safir, 264 F.3d 154, 168-169 (2nd Cir. 2001); Thaddeus-X v. Blatter, 175 F.3d 378, 385-386 (6th Cir. 1999) (*en banc*). The Eighth Circuit has also adopted this view of qualified immunity, but not in a unanimous fashion. See Altman v. Minn. Dept of Corrections, 251 F.3d 1199, 1205-1206 (8th Cir. 2001) (Judge Lay dissenting, advocating for the full exclusion of intent). On the other hand, the Fourth, Fifth and Eleventh Circuits have gone the opposite direction and have fully eliminated the element of intent from the qualified immunity calculus. Altman v. City of High Point, 330 F.3d 194, 213 (4th Cir. 2003); Thompson v.

Upshur County, 245 F.3d 447, 457 (5th Cir. 2001); Koch v. Rugg, 221 F.3d 1283, 1295 (11th Cir. 2000).

This conflict among the Circuits could not be more evident and its implications more serious. Furthermore, the bright-line distinction made by the First Circuit between conduct-based constitutional torts and intent-based torts, and foreclosing the defense of qualified immunity for defendants sued in the latter context is a blatant and unprincipled departure from this Honorable Court's qualified immunity jurisprudence. For government officials facing § 1983 actions for alleged political discrimination (in violation of First Amendment Association rights), in which intent is definitely an element of the underlying claim, qualified immunity has simply been put out of reach. Upon the existence of any conflicting evidence as to what was going on in an officer's psyche, qualified immunity is bypassed and the officer is forced to face the burdens of litigation without any consideration as to whether or not a reasonable officer would have known that his conduct would violate the plaintiff's clearly-established rights. This legal standard of assessing qualified immunity could not be further from this Court's standard set forth in Harlow.

Confusion arises when the district court and reviewing court fail to distinguish between the standards applicable to the qualified immunity analysis and those applicable to summary judgment on the merits. In Saucier v. Katz, 533 US 194, 201-202 (2001), the Supreme Court expressly stated that the qualified immunity analysis is different from an analysis of the merits of a constitutional claim. Immunity, by its definition, shields a defendant from liability, regardless of whether or not an actual violation was committed. Every type of immunity recognized in our system, is

predicated on a higher value that justifies absolving a person of the legal consequences of his actions. The Court's determination that qualified immunity does not exist where improper motive is present (in a motive-related claim) is inconsistent with the settled notion that qualified immunity may exist even in the face of an actual violation. See Robles v. Hoyos, 151 F.3d 1, 6 (1st Cir. 1998); Collins v. Marina-Martínez, 894 F.2d 474, 478 (1st Cir. 1990); Brennan v. Hendrigan, 888 F.2d 189, 194 (1st Cir. 1989).

In Foy v. Holston, 94 F.3d 1528, 1534 (11th Cir. 1996), the Eleventh Circuit recognized that sometimes objectively reasonable actions can be taken both for lawful and unlawful reasons and that "state officials can be motivated, in part, by a dislike or hostility toward a certain protected class to which a citizen belongs and still act likewise is also well established'. In 1997, the Eleventh Circuit revisited Foy and granted qualified immunity to officials accused of the discriminatory termination of a firefighter, where the discharge was based in part on unlawful discriminatory motives as well as for the lawful motives for refusing to obey direct orders at a fire scene and lying at administrative proceedings. Johnson v. City of Ft. Lauderdale, 126 F.3d 1372, 1379 (11th Cir. 1997). The reasoning of the decisions in Crawford-El and Foy constitute the clearest interpretation of the Supreme Court's original formulation in Harlow. See Lisa R. Eskow & Kevin W. Cole, "The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs, Reasonably Unreasonable Conduct, and the specter of Subjective Intent That Haunts Objective Legal Reasonableness," 50 Baylor L. Rev. 869 (1998).

The District Court did not enter into the qualified immunity analysis, but rather dispatched

defendants' contention by a finding that the Mayor's "motivation for denying and deferring Plaintiff's resignation is an unresolved issue of material fact" (App. 21a). In support of its conclusion, the district court relied on two First Circuit decisions, namely Feliciano-Angulo v. Rivera Cruz, 858 F.2d 40, 45-46 (1st Cir. 1988) and Acevedo-García v. Vera-Monroig, 204 F.3d 1 (1st Cir. 2000). We will not discuss Feliciano-Angulo, since it was decided 10 years prior to Crawford-El.

In Acevedo-García, the Court did consider Crawford-El but disregarded as dictum the High Court's articulation of the role of intent in the qualified immunity analysis. Acevedo García, 204 F. 3d at. 12 (1st Cir. 2000). The Acevedo-García Court determined that the effect of Crawford-El was limited to striking down certain procedural guidelines of the District of Columbia Circuit. Id. at 11. We respectfully differ, as the consideration of intent was indeed one of the matters reviewed in Crawford-El. Before beginning its analysis, Justice Stevens, speaking for the majority stated:

> The different views expressed in those five opinions attest to the importance of both the underlying issue and a correct understanding of the relationship between our holding in Harlow and the plaintiff's burden when his or her entitlement to relief depends on proof of an improper motive.

523 US at 584. Furthermore, we fail to see how the Chief Justice's dissenting opinion in any sense supports the contention that denial of qualified immunity at the summary judgment stage may be founded solely on the existence of unresolved factual issues as to a

defendant's intent. On the contrary, the Chief Justice clearly states that:

> Such logic... runs afoul of Harlow's concern that insubstantial claims be prevented from going to trial, and ensures that officials will be subject to the "peculiarly disruptive" inquiry into their subjective intent that the Harlow rule was designed to prevent. Such a rule would also allow plaintiffs to strip defendants of Harlow's protections by a simple act of pleading -- any minimally competent attorney... can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds.

Crawford-El, at pp. 604-605. Not only did the First Circuit err in its construction of the Chief Justice's dissenting opinion but the panel failed to discuss the majority decision at all and instead adopted what they perceived to be Chief Justice Rehnquist's interpretation of the decision's short-comings. At best, it is ill-advised to see the majority's opinion through the eyes of a Judge whose position was rejected.

Clearly, when this Court announced that "evidence concerning the defendant's subjective intent is simply irrelevant to [qualified immunity]", it established a binding precedent on this issue as it was addressing the merits of the petition. Judge Lipez's Opinion in Acevedo-García seeks support in Justice Rehnquist's dissent in Crawford-El. Id. at 11-12. The Acevedo-García Court also seeks support in two other First Circuit decisions, Stella v. Kelley, 63 F.3d 71, 75 (1st Cir. 1995) and Guilliotty-Pérez v. Fuentes-Agostini,

196 F.3d 293, 294 (1st Cir. 1999). Id at p. 12. Stella is a pre-Crawford-El decision; and the Guilliotty-Pérez decision was not based on the reasoning expounded by Crawford-El on its reasoning, but rather relied on Stella. Guilliotty-Pérez, at 294. However, in Abreu-Guzmán v. Ford, 241 F.3d 69, 73 (1st Cir. 2001), a post-Acevedo-García decision, a panel of the First Circuit, by voice of Judge Lynch, citing Crawford-El, conceded that "evidence concerning the officer's 'subjective intent is simply irrelevant' to a qualified immunity defense". The First Circuit decision in Abreu-Guzmán indicates that there is a split within the First Circuit as to the role of intent in the qualified immunity inquiry and the scope of this Court's ruling in Crawford-El. In contrast, most Circuits have fully embraced Crawford-El and excluded the element of intent from their qualified immunity analysis. Morris v. Dillard Dep't Stores, Inc., 277 F.3d 743, 755 (5th Cir. 2001); Doe v. County of Centre, 242 F.3d 437, 454-55 (3rd Cir. 2001); Koch v. Rugg, 221 F.3d 1283, 1295 (11th Cir. 2000); Blake v. Wright, 179 F.3d 1003, 1008 (6th Cir. 1999).

In determining that Respondent had made out a prima facie showing of discriminatory animus the district court rested on the following facts: 1) plaintiff and co-defendant Ortiz Vélez were political rivals in a "*sensationalistic*" campaign for Mayor; 2) plaintiff proffered campaign statements made by defendant against his political adversary; and 3) plaintiff's contention that the Mayor's Secretary told him that the Mayor did not sign papers without importance. The trial court found that plaintiffs had carried their burden because they had proffered evidence of a September 20, 2000 campaign statement where the Mayor stated that he would not "accept the resignation of the candidate because he's being investigated on some sick days he

took. He's a crook". This statement avers to a breach of plaintiff's duties as a municipal employee and to the legitimate efforts by the Municipality to ascertain any possible violation. Even if this statement had been made within the scope of defendant's authority as Mayor of Sabana Grande, this statement corroborates the defendant's asserted legitimate motive for the personnel actions taken against Respondent. The sole fact that the parties ran against each other in an intense political campaign is not indicative of illegal discrimination. The instant litigation confused what is an employment discrimination case and what is a political defamation suit arising from campaign statements. This type of expression, delivered by a political candidate during a partisan election is at the core of First Amendment protection. It is highly ironic that a plaintiff would be permitted to prove a deprivation of First Amendment liberties by using defendant's protected political speech against him. It is also inappropriate to use that speech to generate an issue about motive to preclude qualified immunity when motive is irrelevant to immunity.

III. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE SUPREMACY OF THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS REGARDING CLEARLY ESTABLISHED LAW AND TO DETERMINE WHETHER A REASONABLE OFFICER WOULD HAVE UNDERSTOOD THAT THE DECISION TO DEFER ACCEPTANCE OF A VOLUNTARY RESIGNATION PENDING A PERSONNEL INVESTIGATION PURSUANT TO STATE LAW WOULD VIOLATE THAT EMPLOYEE'S CLEARLY

ESTABLISHED RIGHTS.

The Supreme Court has established that a state actor may avoid liability under the principle of qualified immunity so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known". Harlow v. Fitzgerald, 457 US 800, 818 (1982). In order for a defendant to avail himself of qualified immunity, the challenged conduct must not have violated clearly established right of which a reasonable person would have known at the time, and given the factual circumstances, in which the events took place. Anderson v. Creighton, 483 US 635, 638 (1987). Elder v. Holloway, 510 US 510, 516 (1994). Thus, qualified immunity provides a "*safe harbor*" for a wide range of mistaken judgments. Hatch v. Dept. of Children, 274 F.3d 12, 19 (1st Cir. 2001) (citing Malley v. Briggs, 475 US 335, 341 (1986)).

Against this backdrop we must examine just what actions defendant entered into and whether in carrying out the same, Mayor Ortiz acted reasonably, in light of clearly established law.

Article 12.011(a)(1) of the Autonomous Municipalities Act of 1991, as amended, 21 PR Laws Ann. § 4561(a)(1) (hereinafter referred to as the AMA), lists, among the statutory duties of municipal employees; "Attend work punctually and regularly and comply with the established working day." Article 12.012 of the AMA, 21 PR Laws Ann. § 4562, addresses the disciplinary measures that may be taken against an employee who breaches his/her duties under the previous section. The statute recognizes that municipalities may conduct administrative investigations before imposing any disciplinary

measures. The last sentence of Article 12.0012 states: "When it is found through an administrative investigation that the imposition of corrective or disciplinary measures is not in order, the nominating authority or its authorized representative shall proceed according to the provision of subsections (d) and (e) § 4572 of this title."

Clearly, the Mayor had every reason to believe that under the relevant statutory scheme, he had the authority and indeed was obligated to initiate an administrative investigation to probe plaintiff's unauthorized absences and determine whether there was any cause for sanctions, as compliance with attendance is among the duties of every municipal employee. Given the fact that municipal employees work 5 days per week, 63.5 sick leaves during a five-month period definitely raises a red flag, even more so when the apparently sick employee is seen at public political rallies and marches, actively campaigning for the 2000 elections. Thus, the investigation into the prolonged absences of a municipal employee by the nominating authority is the kind of conduct that would not alert a reasonable officer in the Mayor's position that a clearly established right would be implicated, given the legal standard as of the year 2000. Must an officer look the other way when the conduct is performed by a political candidate who is his adversary?

When Respondent requested to transfer out of the Municipality and into a temporary appointment with a Commonwealth agency, it was objectively reasonable for the Petitioner Mayor to conclude that he had the duty to retain authority over Respondent until the conclusion of the administrative investigation since the relevant statutory provision permitting such

transfers, Article 12.009 of the AMA, also provides that, at the time of transfer, the employee falls under the "authority and supervision of the public agency to which they were transferred." 21 PR Laws Ann. § 4559. Here, plaintiff was being investigated for excessive absenteeism, conduct subject to sanctions under the State and Municipal civil service laws. Thus, had plaintiff been transferred on April 2000, he would have effectively escaped from the municipal investigation into his unauthorized absences and the Municipality would have been stripped of authority to carry on with the investigation and/or to sanction improper behavior. Hence, an objectively reasonable officer in the Mayor's position would have concluded that he was entitled to defer a transfer request in order to preserve the authority to continue with the investigation.

Finally, and most importantly, these actions rest on clearly established Puerto Rico law as discussed in the case of Brunet Justiniano v. Hernández Colón, 130 DPR 248, 262-63, 1992 PR Eng. 755, 646, which recognized a limitation to the right of a public employee to resign from his position. The Supreme Court of Puerto Rico held that it would be inappropriate to apply an absolute rule requiring acceptance of a resignation when the resigning employee is subject to an investigation related to his performance in public employment. In Brunet Justiniano, the Governor refused to accept the resignation of an independent counsel who was under investigation for alleged misconduct in relation to the infamous events of July 25, 1978, commonly known as the *Cerro Maravilla* case. Id at p. 252. As a matter of fact, Attorney Brunet was ultimately dismissed. Id at p. 253. To this day, Brunet Justiniano remains the only state court opinion

regarding the resignation of a public employee who is under investigation. The case law of the district of Puerto Rico and the First Circuit does not shed any more light on this subject. Thus, the only available precedent regarding defendant's conduct supported the action taken. Clearly, defendant Ortiz Vélez was entitled to qualified immunity.

IV. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE SUPREMACY OF THIS COURT'S QUALIFIED IMMUNITY PRECEDENTS REGARDING THE VIOLATION OF CONSTITUTIONAL LAW AND TO DETERMINE WHETHER THE DEFERRED ACCEPTANCE OF A PUBLIC EMPLOYEE'S LETTER OF VOLUNTARY RESIGNATION PENDING A PERSONNEL INVESTIGATION INTO UNAUTHORIZED ABSENCES PURSUANT TO STATE LAW CONSTITUTES A MUNICIPAL LAW, POLICY OR CUSTOM IN VIOLATION OF THAT EMPLOYEE'S CONSTITUTIONAL RIGHTS.

The verdict rendered on December 9, 2002, imposed liability solely against Mayor Ortiz in his individual capacity. The Court agreed with this verdict and told the jury that: "According to this, the municipality did not have a policy. **This thing was basically the Mayor's thing.** And I will enter the appropriate judgment." Quoted in Rivera-Torres, 341 F.3d at 43. Surprisingly, the district court entered a subsequent Order imposing liability upon the municipality as a matter of law citing a First Circuit decision, Cordero v. De Jesús-Méndez, 867 F.2d 1, 7-8

(1st Cir. 1989), and arguing that all employment decisions undertaken by the Mayor represent municipal policy and that liability would be imposed on the City of Sabana Grande as a matter of law. No further analysis was furnished by the Court. For the foregoing reasons we disagree with the modification of the verdict.

Local governments are considered "*persons*" within the meaning of 42 USC § 1983 and thus may be liable for the deprivation of civil rights when such deprivation occurs under color of state law. Monell v. New York Department of Social Services, 436 US 658 (1978). When municipal officers are sued in their official capacities, the suit is considered as a claim against the Municipality itself. Brandon v. Holt, 469 US 464, 471 (1985); Will v. Michigan Department of State Police, 491 US 58 (1989); Andino-Pastrana v. Municipio de San Juan, 215 F.3d 179 (1st Cir. 2000). In order to make out a claim for municipal liability under section 1983, plaintiff must show that "the execution of a government's policy or custom, whether made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury", Monell at page 694.

In the case of Silva v. Worden, 130 F.3d 26 (1st Cir. 1997), the First Circuit adopted the test for municipal liability set forth in Pembaur v. Cincinnati, 475 US 469 (1986). The Pembaur test requires the constitutional injury to arise: 1) from decisions of a duly constituted legislative body; or 2) from the acts of the officials whose acts may be fairly said to be those of the Municipality. In any case, municipal liability may only be sustained when the plaintiff demonstrates that "through its deliberate conduct, the municipality was the moving force behind the injury alleged", Board of the County Commissioners of Bryan County v. Brown,

520 US 397, 404 (1997). It must be noted that "the fact that a particular official -- even a policymaking official -- has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion." Pembaur v. City of Cincinnati, 475 U.S. 469, 481-82 (1986). This is precisely the conclusion at which the district court arrived. The Seventh Circuit has held that the fact that

> a particular agent is the apex of a bureaucracy makes the decision 'final' but does not forge a link between 'finality' and 'policy'. [...] Liability for unauthorized acts is personal; to hold the municipality liable . . the agent's action must implement rather than frustrate the government's policy.

Auriemma v. Rice, 957 F.2d 397, 400 (7th Cir. 1992).

In the instant case, plaintiff tailored his evidence to prove that Mayor Ortiz had a personal animosity against the person who opposed him in the 2000 race. As a matter of fact, plaintiffs' evidence of an allegedly discriminatory animus was confined to quotations from Mr. Ortiz's campaign statements. This is the very reason why the district court originally characterized the actions taken as "the Mayor's thing." Taken at face value, Respondent's argument is that Mayor Ortiz misused his influence to somehow affect the possibilities of success of his political rival. There is no evidence in the record, suggestive of the Mayor implementing any sort of municipal policy, as municipal policies have ultimately no relationship with the campaign strategies of a municipal officer who is running for reelection.

In the case of City of Canton v. Harris, 489 US 378, 424 (1989), the Supreme Court stated that "our

first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation". The evidence in the instant case does not establish this causal link.

CONCLUSION

For the foregoing reasons, Petitioners submit that this Court should grant review in this case to reverse the holding of the First Circuit.

RESPECTFULLY SUBMITTED,

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December 22, 2003

(Any footnotes trail the end of each document)

Civil No. 01-1244 (JAF)

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

SANTOS RIVERA TORRES, et al.
Plaintiffs,

v.

MIGUEL G. ORTIZ VELEZ, et al.,
Defendants.

OPINION AND ORDER

Plaintiffs, Santos Rivera Torres ("Rivera Torres"); his wife, Daisy Nazario Santana; their conjugal partnership; and their daughters, Yasira and Zahira Rivera Nazario, bring the present complaint against the Municipality of Sabana Grande ("Municipality") ; the Mayor of the Municipality, Miguel G. Ortiz Velez; the Municipality's Sports Director, Sammy Vega; and other unnamed Defendants. Docket Document No. 1. Plaintiffs allege violations of § 1983 (1994 & Supp. 2002) and Puerto Rico law. Id.

Defendants Municipality, Ortiz, and Vega move for summary judgment, Docket Document Nos. 47, 55. Plaintiffs oppose the motion. Docket Document Nos. 56, 70.

Factual and Procedural Synopsis

Unless otherwise indicated, we derive the following factual summary from the statement of uncontested facts submitted by Defendants in their motion for summary judgment and by Plaintiffs in opposition. Docket Document Nos. 47, 55, 56, 70.

Defendants Ortiz and Vega are affiliated with the Partido Popular Democratico (Popular Democratic Party, "PPD"). Docket Document No. 1. Plaintiff Rivera Torres has bean associated with the Partido Nuevo Progresista (New Progressive Party, "NPP") November 1998. [1]

Plaintiff Rivera Torres began working at the Municipality as a Sports Instructor and became a career employee of Defendant Municipality on January 1, 1982. On May 1, 1988, Plaintiff was transferred to the career position of "in-charge" of the Municipal Gymnasium.

Plaintiff Rivera Torres affiliated himself with the New Progressive Party in November 1998. Two weeks later, Plaintiff Rivera Torres became the local president of the party and the official candidate for the 2000 mayoral race in Sabana Grande.

Plaintiff ran in opposition to the incumbent PDP candidate, Defendant Ortiz.

Plaintiff asserts that once he became a member of the NPP and a mayoral candidate, he suffered a rash of discriminatory behavior at the hands of his supervisors and municipal officers. Docket Document Nos. 1, 56.

Plaintiff alleges that the first act of political discrimination occurred in January 1999 when Defendants demoted him, stripped him of his authority, and assigned Luis Arenas to the gym to watch over Plaintiff and report back to Defendants about his actions. Docket Document No. 56. Plaintiff claims that in the same month, Defendants removed the phone from the Municipal Gymnasium, which impeded his ability to work effectively. Id.

Plaintiff also avers that in March 1999, Defendants suspended plaintiff for thirty days based on alleged workplace infractions. Id. Plaintiff appealed the suspension in June 1999, and it was eventually overturned in October 2000 by Puerto Rico's Personnel Administration Systems Appeal Board. At that time, the sanction was deleted from Plaintiff's record and he was paid his past unearned salary. Id.

Plaintiff contends that in April 2000, Defendants refused to approve his proposed transfer to the Commonwealth's Department of Sports and Recreation.

Finally, Plaintiff asserts that he attempted to resign in June 5, 2000 because he felt that he was the victim of political persecution. Id. In a letter dated June 28, 2000, Defendant Ortiz refused to accept Plaintiff's proffered resignation because plaintiff was under investigation for a considerable number of absences from work. Although Plaintiff's resignation was not accepted, he alleges that he was not allowed to continue working at the gym.

Plaintiff Rivera Torres and Defendant Ortiz continued to campaign against each other in the race for mayor. Plaintiff submits tapes of statements made by Defendant Ortiz between June and October 2000. In the tapes, Defendant Ortiz claims that Plaintiff is a weak candidate and refers to Plaintiff as a thief and a rat. Plaintiff alleges that on September 20, 2000, Defendant Ortiz stated that he would not "accept the resignation of the candidate because he's being investigated on some sick leave days he took. He's a crook." Plaintiffs assert the comments made in the context of the campaign establish Defendant Ortiz' political animus toward Plaintiff Rivera Torres.

On November 7, 2000, Defendant Ortiz won the race for mayor. On November 13, 2000, Defendant Ortiz accepted Plaintiff's resignation. Plaintiff claims that Defendant Ortiz, inordinate delay in accepting his resignation was politically motivated and effectively disabled Plaintiff from finding other government employment.

Defendants deny that political animus motivated any of their actions. They assert that Plaintiff was unduly absent from work and away from his work area, which prompted their personnel decisions. Plaintiff counters that most of his absences were caused by a shoulder injury in January 1999 and were approved by his physician. Plaintiffs filed the present complaint on February 28, 2001, alleging that Plaintiff Rivera Torres suffered political discrimination and deprivation of due process in violation of the First and Fourteenth Amendments of the Constitution, U.S. CONST. amend I, XIV, and 42 U.S.C. § 1983. Docket Document No. 1. Plaintiffs Nazario Santana, Yasira Rivera Nazario, and

Zahira Rivera Nazario assert emotional distress under Puerto Rico tort law. Id. Plaintiffs request compensatory and punitive damages, as well as injunctive relief. Id.

The Deputy Mayor of the Municipality, Noel Matias, and the Municipality's Human Resources Director, Migdalia Rodriguez, were included in the complaint as Defendants. Id. Defendants Rodriguez and Matias moved to dismiss for failure to state a claim on July 5, 2001. Docket Document No.19. On September 5, 2001, we granted the motion to dismiss as requested. Docket Document No. 34.

Defendants Municipality, Ortiz, and Vega moved for summary judgment on July 1, 2002 and tendered a supplemental motion on October 7, 2002. Docket Document Nos. 47, 55, 65. Defendants maintain that Plaintiff Rivera Torres's section 1983 action is partially barred by the applicable statute of limitations and the doctrine of qualified immunity. They further argue that Plaintiff has not establish a viable claim of political discrimination against Defendant Vega.

Plaintiff opposes the motion for summary judgment on the grounds that his action is timely under the continuing violation doctrine, that he has articulated a claim for political discrimination against each of the remaining Defendants, and that qualified immunity is not applicable in this instance. Docket Document Nos. 56, 70.

II.

Standard for Summary Judgment

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, and answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a Matter Of law." FED. R. CIV. P. 56(c); see Lipsett v. Univ. P.R., F.2d 881, 894 (1st Cir. 1988). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law," and "genuine" if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The burden of establishing the nonexistence of a genuine issue as to a material fact is on the moving party, Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986).This burden has two components: (1) an initial burden of production, which, shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. Id. In other words, "[t]he party moving for summary judgment, bears the initial burden of demonstrating that there are no genuine issues of material fact for trial." Hinchey v. NYNEX Corp., 144 F.3d 134, 140 (1st Cir. 1998). This burden "may be discharged by showing that there an absence of evidence to support the nonmoving party's Celotex, 477 U.S. at 325. After such a showing, the "burden shifts to the nonmoving party, with respect to each

issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in his favor."' DeNovellis v. Shalala, 124 F.3d (1st Cir. 1997) (citing Celotex, 477 U.S. at 322-25).

Although the ultimate burden of persuasion remains on the moving party and the court should draw all reasonable inferences in favor of the nonmoving party, the nonmoving party will not defeat a properly supported motion for summary judgment by merely underscoring the "existence of some alleged factual dispute between the parties; the requirement is that there be a genuine issue of material fact. 477 U.S. at 247-48; Goldman 985 F.2d 1113, 1116 (1st Cir. 1993). In addition, "factual disputes that are irrelevant or unnecessary will not e counted." 477 U.S. at 248. Under Rule 56 (e) of the Federal Rules of Civil Procedure, the non-moving party may not rest upon the mere allegations or denials of the adverse party's pleadings, but must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56 (e); see also Anderson, 477 U.S. at 256. Summary judgment exists to "pierce the boilerplate of the pleadings," Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992), and "determine whether a trial actually is necessary. " Vega-Rodriguez v. P.R. Tel., 110 F.3d 174, 178 (Cir. 1997).

III.

Analysis

A. Statute of Limitations

Plaintiffs filed the present action on February 28, 2001. Defendants move for summary Judgment on the ground that any alleged section 1983 violation that occurred more than one year before Plaintiff a filed suit is time-barred. Docket Document No. 55.

Plaintiffs counter that Defendants have continuously discriminated against Plaintiff Rivera Torres since January 1999 and that each politically discriminatory act restarts the statute of limitations. Docket Document No. 70.

1. Applicable Statute of Limitations

To determine the applicable statute of limitations for this action, we first turn to Section 1983 to determine Its provisions. Section 1983, however, lacks an accompanying federal statute of limitations.[2] See 42 U.S.C. § 1983. Consequently, we adopt relevant provisions from the analogous statute of limitations of the form state. See Wilson v. Garcia, 471 U.S. 261, 266-80 (1985) (directing federal courts in section 1983 actions to borrow and apply a state's statute of limitations for personal injury cases).

The parties agree that in section 1983 actions, the most appropriate provision is the statute of limitations for personal injury cases. See Owens v. Okure, 488, 235, 236 (1989). In Puerto Rico, a one-year statute of

limitations governs personal injury actions. See 31 L.P.R.A. § 5298 (2) (1991).[3] Therefore, we apply the one-year prescriptive period to Plaintiffs' section 1983 action. see Rivera-Ramos v. Roman, 156 F.3d 276, 282 (1st Cir. 1998).

2. Date of Accrual

"Although the limitations period is determined by state law, the date of accrual is a federal law question." Carreras-Rosa v. Alves-Cruz, 127 F.3d 172, 174 (1st Cir. 1997) (per curiam); see also Rivera-Ramos, 156 F.3d at 282 ("For section 1983 actions, federal law governs the date on which a cause of action accrues (i.e., when the statute begins to run) while the length of the period and tolling doctrine are taken from local law.") (internal citations omitted). The one-year statute of limitations "begins running one day after the date of accrual, which is the date plaintiff knew or had reason to know of the injury." Benitez-Pons v. P.R., 136 F.3d 54, 59 (1st Cir. 1998) (internal citations omitted).

" It is by now well established that, in employment discrimination actions, limitations periods normally start to run when the employer's decision is made and communicated to the affected employee." Morris v. Gov't Dev. Bank of P.R., 27 F.3d 746, 750 (1st Cir. 1994) (section 1983 case) (citing Delaware State Coll. v. Ricks, 250, 261 (1980)). A plaintiff does not need to know of the discriminatory animus behind the adverse employment action for the statute of limitations to begin to run. Morris, 27 F.3d at 749-750. Furthermore, a plaintiff does not need to know all of the facts supporting his claim before the statute of limitations may commence. Id. at 750 (internal citations omitted).

Rather, unambiguous and authoritative notice of the adverse employment action is all that is required to trigger the limitations period. Rivera-Muriente v . Agosto-Alicea, 959 F.2d 349, 353 (1st Cir. 1992) (section 1983 case).

3. Alleged Acts of Discrimination

"The first step in fixing accrual is to identify the actual injury of which the plaintiff complains." Guzman-Rivera v. Rivera-Cruz, 29 F.3d 3, 5 (1st Cir. 1994).

Plaintiff Rivera Torres bases his section 1983 action on the following alleged incidents of political discrimination: (1) In January 1999, Defendants removed the phone from his office; (2) in January 1999, Defendant Ortiz ordered Arenas, another employee of the Municipality, to take on Plaintiff's job duties, supervise Plaintiff, and track his movements; (3) In March 1999, Defendants falsely accused and unjustly suspended Plaintiff for leaving his work-area and being absent from work; (4) In April 2000, Defendant Ortiz refused to approve Plaintiff's transfer to the commonwealth's Sports and Recreation Department in Mayaguez; (5) On June 28, 2000, Defendant Ortiz declined to accept Plaintiff's resignation and then intentionally deferred the decision to accept the resignation until after the local elections.

Defendants acknowledge that Defendant Ortiz' refusal to transfer Plaintiff in April 2000, his refusal to accept plaintiff's resignation in June 2000, and the decision to approve the resignation in November 2000 fall within the applicable statute of limitations.[4] Docket Document

No. 55. They maintain that any other alleged incidents are time-barred.

Plaintiff had notice of the alleged phone removal and the appointment of Arenas in January 1999. Therefore, these claims accrued at that time. See Morris, 27 F.3d at 750 (finding that claim accrued on date that plaintiff had authoritative notice of his suspension). Similarly, Plaintiff Rivera Torres' claim that Defendants falsely accused and unjustly suspended him accrued March 10, 1999 because that is the day that he learned of his suspension. Id. Consequently, these acts are time-barred.

Although Plaintiff acknowledge that many of the purportedly discriminatory acts occurred outside of the statute of limitations period, he invokes the continuing violation doctrine as a means to rescue his otherwise time-barred allegations. Docket Document No. 70.

4. Continuing Violation Doctrine

The continuing violation doctrine creates an equitable exception to the statute of limitation when unlawful behavior is alleged to be ongoing. Provencher v. CVS, Pharmacy, 145 F.3d 5, 13 (1st Cir. 1998). In effect, the continuing violation theory allows a plaintiff to prosecute claims that would otherwise be time-barred. However, [t]he [continuing violation] doctrine is generally thought to be inopposite when an injuy is definite, readily discoverable, and accessible in the sense that nothing impedes the injured party from seeking to redress it. Dziura v. United States, 168 F.3d 581, (1st Cir. 1999) (rejecting plaintiff's continuing violation theory in taxpayer suit against IRS).

In Morgan v. Nat'l R.R. Passenger Corp., 122 S. Ct. 2061 (2002), the Supreme Court clarified the continuing violation doctrine in the context of a Title VII race discrimination case. In Morgan, the Court found that a plaintiff who alleges discrete acts of discrimination, such as a failure to promote or transfer, can only recover for those acts that occurred within the relevant statute of limitations period. Id. at 2073. Discrete acts of discrimination that occurred outside of the statute of limitations period are not actionable, even if they are substantially related to the timely act.

The reasoning in Morgan applies with equal force to the present section 1983 suit. Cf. Muniz-Cabrero v. Ruiz, 23 F.3d 607, 610 (1st Cir. 1994) (explaining that the First Circuit employs the continuing violation theory to evaluate the timeliness of section 1983 actions); Velazauez v. Chardon, 736 F.2d 831, 833 (1st Cir. 1984) (applying Title VII case law to interpret potential continuing violation section 1983 action). Plaintiff alleges that Defendants denied his request to transfer and delayed the approval of his resignation in the one-year period before he filed suit. These alleged acts of political discrimination are discrete in nature. See Morgan, 122 S.Ct. at 2073. Plaintiff cannot use discrete acts that occurred within the statute of limitations to save discrete time-barred acts of discrimination. Id. Since Plaintiff's alleged deprivation duties and equipment in January 1999 and his suspension in March 1999 are discrete in nature, they are not actionable under the continuing violation theory.[5]

B. Defendant Vega

Defendant Vega moves for summary judgment on the ground that Plaintiff Rivera Torres has not made allegations or submitted evidence that he engaged in any acts of discrimination or deprived Plaintiff of his constitutuional rights. Docket Document No. 47.

We examine Defendant Vega's contention in the context of the remaining claims of discrimination, which include the denial of a request to transfer an the denial an deferment of a request resign.

In the opposition to summary judgment, Plaintiff alleges that "Co-Defendant Sammy Vega participated in the political persecution to harm an terminate Plaintiffs." Docket Document No. 56. Plaintiff does not make specific factual allegations to this effect. Furthermore, Plaintiff has not proffered evidence that Defendant Vega supervised, carried out, or participated in any of the purported acts of discrimination that occurred within the statute of limitations. As such, Plaintiff has failed to create a genuine issue of material fact as to his claims against Defendant Vega. See FED. R. CIV. P. 56 (e) (explaining that the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial."). Therefore, this court dismisses plaintiff's claim of political discrimination against Defendant Vega.[6]

We turn now to the merits of Plaintiff's claims of political discrimination against Defendants Municipality and Ortiz.

C. Political Discrimination

Plaintiff asserts that Defendants Municipality and Ortiz violated his First Amendment rights by declining to transfer him and denying and delaying his request to resign.

The First Amendment protects non-policymaking public employees m adverse employment actions based on their non-conforming political opinions. See Padilla-Garcia v. Guillermo Rodriguez, 212 F.3d 69, 74 (1st Cir. 2000); see also Rutan v. Republican Party of Illinois 497 U.S. 62, 75-76 (1990). We employ a two part burden-shifting analysis to evaluate claims of political discrimination. See Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle 429 U.S. 287 (1977); Padilla-Garcia 212 F.3d at 74.

To establish a prima facie case, a plaintiff must show that party affiliation was a substantial or motivating factor behind a challenged employment action. Padilla-Garcia, 212 F.3d at 74. The burden then shifts to the defendant, who must establish, by a preponderance of the evidence, that he would have taken the same action regardless of the plaintiff's political beliefs. Id. Nonetheless, "[t]he evidence by which the plaintiff established her prima facie case may suffice for a factfinder to inter that the defendant,s reason is pretextual and to effectively check summary judgment." (internal citations omitted).

1. Transfer

(a) Prima Facie Case

On April 28, 2000, Eric Labrador Rosa, the Secretary of the Commonwealth's Department of Sports and Recreation, wrote a letter to Defendant Ortiz explaining that Plaintiff Rivera Torres had been selected to work for the Commonwealth as an Administrative Assistant

I. Docked Document No. 47, Exh. 27. Labrador Rosa requested transfer change report by May 16, 2000 to complete Plaintiff's transfer from the Municipality's Department to that of the Commonwealth. Id. Defendant Ortiz never responded is the letter, and as a result, the transfer was never effectuated. Id. at Exh. 38.

A public employer cannot deny its employee a transfer based on that employee's political affiliation. see Rutan, 497 U.S. at 76. Evidence of a highly charged political atmosphere coupled with the parties' competing political persuasions may he sufficient to show discriminatory animus, especially in an instance where a plaintiff was a "conspicuous target" for political discrimination. Rodriguez Rios v. Cordero, 138 F.3d 22, 24 (1st Cir. 1998); Acevedo-Diaz v. Aponte, 1 F.3d 63, 69 (1st Cir. 1993). Thus, we consider whether Plaintiff has proffered evidence that would "permit a rational factfinder to conclude that the challenged personnel action occurred and stemmed from a politically based discriminatory animus." Rivera-Cotto v. Rivera, 38 F, 3d 611, 614 (1st Cir. 1994).

The parties do not dispute that Defendant Ortiz refused approve Plaintiff's transfer. Since Plaintiff has identified an adverse employment action, we evaluate whether discriminatory political animus caused the employment decision at issue here.

When Plaintiff sought the transfer, he and Defendant Ortiz were political rivals in a sensationalistic campaign for mayor. Plaintiff has proffered numerous statements by Defendant Ortiz as evidence of his political animus toward Plaintiff, including public statements that Plaintiff, his political opponent, was a rat, thief, and a crook. Furthermore, Plaintiff attests that Defendant Ortiz' secretary told him that Defendant Ortiz refused to approve the transfer because the mayor did not sign papers without importance, and that this particular request was not important to him. This evidence, viewed together, is sufficient to establish Defendant Ortiz, political animus. Therefore, we find that Plaintiff Rivera Torres has stated a prima facie case of a politically discriminatory failure to transfer.

(b) Mt. Healthy Defense

The burden shifts to Defendants, who must show, by a preponderance of the evidence, that they would have taken the same action regardless of Plaintiff's political affiliation. Padilla-Garcia, 212 F.3d at 77.

Defendants maintain that they have satisfied this burden because they were investigating Defendant for frequent absences from work. evidence, Defendant Ortiz submits an, affidavit stating that by the time he received the request for the transfer in April 2000, his office was investigating Plaintiff's poor attendance

record. Defendant Municipality's Human Resources Director, Migdalia Rodriguez, also attests that she began an investigation into Plaintiff Rivera Torres's excessive absences in April 2000. However, neither Ortiz nor Rodriguez actually attests that this investigation was the reason they denied the transfer. Furthermore, Defendants have not submitted any evidence that a fledgling investigation into an employee's record of absenteeism is a sufficient basis to deny a transfer or that this was normal procedure. Without evidence to this effect, we necessarily find that Defendants have not satisfied their burden.

As an alternative justification for the decision, Defendants claim that the denial of the transfer actually helped Plaintiff. Defendants argue that a transfer to the Commonwealth would have involved materially adverse conditions and would have been considered demotion. Defendants point to documents prepared by the Commonwealth in May and June 2000, which indicate that Plaintiff's proposed transfer would constitute a demotion. However, these internal documents were completed after the April 28, 2000 request for the transfer had been submitted to Defendant Ortiz for his approval. Furthermore, these papers were not provided to Defendants until two years later, in July 2002, pursuant to a subpoena in the present suit. Defendants do not offer any evidence that they knew or suspected that the transfer would have been equivalent to a demotion at any time while the request for the transfer was pending. Moreover, Defendants do not submit that this was actually their motivation. Finally, Defendants have not expressed that they had a duty to deny a voluntary transfer if it might negatively effect a municipal employee's salary.

Therefore, we find that Defendants' proposed justification does not satisfy their burden.

Defendants have not established by a preponderance of the evidence that they would have refused to transfer Plaintiff regardless of his political affiliation. As such, Defendants are not entitled to the Mt. Healthy defense in this instance of alleged discrimination.

2. Resignation

(a) Prima Facie Case

It is undisputed that on June 28, 2000, Defendant Ortiz declined to accept Plaintiff's resignation and deferred acceptance until after the November 7, 2000 elections. Defendants do not challenge Plaintiff's position that this was an adverse employment action.

Plaintiff asserts that Defendant Ortiz denied his resignation because of Plaintiff's political affiliation and outspoken political beliefs. As evidence of the alleged political animosity, Plaintiff refers to the heated campaign between himself and the incumbent candidate, Defendant Ortiz. Plaintiff has proffered numerous statements by Defendant Ortiz as evidence of political animus, including his alleged public statement on September 20, 2000 that he would not "accept the resignation of the candidate because he's being investigated on some sick leave days he took. He's a crook." The proffered evidence, viewed together, is sufficient to establish Defendant Ortiz' political animus. Therefore, we find that Plaintiff has established a prima facie case of political discrimination with, regards to the decision his resignation.

(b) Mt. Healthy Defense

In his letter denying Plaintiff's request to resign, Defendant Ortiz reasoned that "[i]n view of the fact that the Municipality of Sabana Grande is investigating your pattern of absences due to illness and there exist justified reasons to prove that these could be unjustified, I am obligated to not accept the resignation." Docket Document No. 47, Exh. 30. Defendant Ortiz further states that he seeks to "determine whether the 63 ½ absences during the period from January 13 to May 31, 2000, respectively, due to motives of illness, are justified, when on the other hand, you are actively participating in a political campaign." Id

.

Although Plaintiff River, Torres does not challenge Defendant Ortiz' right to accept or reject his resignation, Plaintiff attests that the underlying investigation into his absences was a pretext for political animus and a way to find out if Plaintiff was actually absent because he was working on his political campaign. Plaintiff contends that Defendant Ortiz illegally intertwined his position as a candidate for mayor with his role as a Municipal officer and employer.

"In a political discrimination case, the plaintiff may discredit the proffered nondiscriminatory reason, either circumstantially or directly, by adducing evidence that discrimination was more likely than not a motivating factor." Padilla-Garcia, 212 F.3d at 77.

Here, Plaintiff has presented ample evidence that Defendant Ortiz harbored political animus toward him. Plaintiff and Defendant Ortiz were political opponents

when Defendant Ortiz began investigating Plaintiff's attendance record, declined to accept Plaintiff's resignation, and publicly inferred that he refused, to do because Plaintiff was a crook. The evidence suggests that Defendant Ortiz' political rivalry with Plaintiff illegally permeated the employer-employee relationship. The proof of discriminatory animus in the present case is sufficient to create a genuine issue as to whether Defendant Ortiz' investigation served as a pretext to mask his improper motive. See Aponte-Santiago v. Lopez-Rivea, 957 F.2d 40, 43 (1st Cir. 1992); see also Rodriguez-Rios, 138 F.3d at 26; Acevedo-Diaz v. Aponte, 1 F.3d 62, 70 (1st Cir. 1993). Since Defendants have not foreclosed the possibility that Plaintiff's political affiliation was a substantial or motivating factor in Defendant's decision to decline and defer Plaintiff's resignation, we decline to summarily dispose of this claim,

D. Qualified Immunity

Defendant Ortiz seeks qualified immunity in the present case for his decision to deny and defer Plaintiff's request to resign, Defendant Ortiz maintains that we should not subject him to personal liability for properly investigating plaintiff's absences from work. Plaintiff maintains that Defendant Ortiz acted knowingly and with bad faith.

Qualified immunity is are affirmative defense shielding public officials sued in their individual capacity from civil damages s long their conduct does not violate any clearly-established statutory or constitutional right of which a reasonable person would aware. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Nereida-Gonzalez

v. Tirado-Delgado, 990 Fd.2d 701, 704 (1st Cir. 1993) (stating that the doctrine of qualified immunity "shields government officials performing discretionary functions from civil liability for money damages when their conduct does not violate 'clearly established, statutory authority or constitutional rights of which a reasonable person would have known."). As such, we must determine as a matter of law whether the constitutional right in question was clearly established at the time of the alleged violation. See Martinez-Rodriguez v. Colon-Pizarro, 54 F.3d 980, 988 (1st Cir. 1995). The phrase clearly established "denotes that at the time the challenged conduct occurred the contours of the right were sufficiently plain that a reasonably prudent state actor would have realized not merely that his conduct might be wrong, but that it violated a particular constitutional right." Id. (internal citations omitted); see Anderson v. Creighton, 483 U.S. 635, 638-40 (1987).

Defendant Ortiz does not challenge whether the law politically-motivated adverse employment decisions is clearly established. Rather, Defendant Ortiz asserts that his decisions to deny and defer Plaintiff's resignation were not motivated by political animus. However, as we explicated supra, Defendant Ortiz' motivation for denying and deferring Plaintiff's resignation is an resolved issue of material fact.

If we were to now take Defendant Ortiz, alleged rational for the decision at face value, we "'would permit an official to be granted qualified immunity as a matter of law even though the principal disputed question of fact in the case--the true purpose of intent motivating the official's conduct--remains unresolved.'" Feliciano-Angulo v. Rivera-Cruz, 859 F.2d 40, 45-46 (1st

Cir. 1988) (internal citation omitted); see also Acevedo-Garcia v. Vera-Monriog, 20 F.3d 1, (1st Cir. 2000). Therefore, we decline to resolve the issue of qualified immunity sine there remains a material question of fact as to Defendant's motivation for the challenged employment action.

IV.

Conclusion

In accordance with the foregoing, we GRANT in part and DENY in part Defendants' motion for summary judgment.

We find that Plaintiff's claims of political discrimination that accrued more than one year before Plaintiff filed suit are time-barred, and we GRANT Defendants' motion to dismiss Plaintiff's claims that Defendants removed his phone and appointed Arenas to the gym in January 1999 and suspended him in March 1999.
We GRANT Defendant Vega's motion to dismiss Plaintiff's claims of political discrimination against him on the ground that there is no genuine issue of material fact as to Defendant Vega's role in the alleged deprivations of Plaintiff Rivera Torres' First Amendment rights.

We DENY Defendants Ortiz and Municipality's motion for summary disposition of Plaintiff Rivera Torres' timely claims of political discrimination.

We DENY Defendant Ortiz' motion for qualified immunity.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of November, 2002.

JOSE ANTONIO FUSTE
U.S. District Judge

FOOTNOTES

[1] Future references to "Plaintiff" allude to plaintiff Santos Rivera Torres.

[2] Section 1983 provides;

person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[3] Section 5298 stipulates:

The following prescribe in one (1) year;

(2) Actions to demand civil liability for grave insults or calumny, and for obligations arising from the fault or negligence mentioned in section 5141 of this title, from the time the aggrieved person had knowledge thereof.

31 L.P.R.A. § 5298.

[4] Plaintiff Rivera Torres appears to argue that Defendant Ortiz' November 13, 3000 acceptance of Plaintiff's resignation violated his due process rights. Docket Document No. 1. In the context of the present summary judgment, however, both parties refer to this incident merely as an act of political discrimination in violation of the First Amendment. As such, we do not analyze this incident within the framework of the Amendment.

[5] Although we need not decide the issue at this time, it is possible that the time-barred prior incidents will be admissible as relevant background evidence. See O'Rourke v. City of Providence, 235 F.3d 713, (1st Cir. 2001) (internal citation omitted).

[6] Future references to "Defendants" allude to Defendants Ortiz and Municipality.

Civil No. 01-1244 (JAF)

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

SANTOS RIVERA TORRES, et al.
Plaintiffs,

v.

MIGUEL G. VELEZ, et al.,
Defendants.

ORDER

I.

On July 31, 2002, following a pretrial conference in the present case, we scheduled the pending jury trial to begin at 9:30 a.m. on Monday December 2, 2002. Docket Document No. 54.

On November 26, 2002, we, inter alia, denied Defendant Ortiz motion for summary judgment on the basis of qualified immunity. Docket Document Not 73. We found that there was a question of material fact surrounding Defendant Ortiz' decisions regarding Plaintiff's twenty-year career status employment and its term1nation.1 Id. Defendants and their attorneys failed to appear at trial on the morning of December 2, 2002, and we imposed sanctions. See Docket Document No 74. At that time, we reset trial for December 3, 2002, Later that day, we received Defendants' urgent motion, to reschedule the trial. Docket Document No. 76

On December 2, 2002 at 4:48 p.m., Defendants filed a motion to stay the proceedings, Docket Document No. 77. Defendants moved to stay on the grounds that we: (1) lacked subject matter jurisdiction; (2) did not have an opportunity to reconsider our partial denial of summary judgment; and (3) were aware that Defendants' counsel would not be available for trial, and were unfairly forcing another attorney from the Law Offices of Pedro Ortiz Alvarez to appear at trial. Id.

On the same date, Defendant Ortiz, acting in his individual capacity, appealed our finding that he was not entitled to summary judgment based on qualified immunity and moved to stay trial pending the appeal. Docket Document No, 77. The First Circuit found that Defendant Ortiz had not explained why our rejection of the qualified immunity defense was immediately appealable and denied the motion to stay trial. Docket Document No. 80. Defendant Ortiz then filed a motion for reconsideration of the First Circuit's denial of a stay, with the First Circliit denied on December 5, 2002. In its order, the court directed us to expressively act on Defendants' motion to stay trial.

On December 6, 2002, Defendants filed a brief in support of their motion to stay.

II.

A. Qualified Immunity

We first consider Defendant's assertion that his appeal on the issue of qualified, immunity divested this court of subject matter jurisdiction.

The present case involves a twenty-year career employee of the Municipality of Sabana Grande who maintains that he experienced a series of politically motivated adverse employment actions when he switched political parties and ran in opposition to the incumbent mayoral candidate, Defendant Ortiz. Following the campaign, Plaintiff lost his career position under circumstances strongly suggestive of constructive discharge.

"It is now well established that political patronage restrains freedom of belief and association, core activities protected by the First Amendment." Padilla-Garcia v. Guillermo-Rodriguez, 212 F.3d 69, 74 (1st Cir. 2000). As such, the Supreme Court has clearly held that the first Amendment protects non-policymaking public employees from adverse employment decisions based on their political affiliation. Id. (internal citations omitted); see also Rutan v. Republican Party of Illinois, 497 U.S. 62, 75-76

Qualified immunity is an affirmative defense shielding public officials sued in their individual capacity from civil damages so long as their conduct does not violate any clearly established statutory or constitutional right of which a reasonable person would be aware. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Since it is an affirmative defense, the burden of proof is on the defendant. DiMarco-Zappa v. Cabnillas, 238 F.3d 25, 35 (1st Cir. 2001).

In the underlying motion for summary judgment, Defendant Ortiz did not dispute that the law is clearly established as to the issue of politically motivated adverse employment decisions, Defendant Ortiz raised

the quality immunity defense in a limited fashion by asserting that political affiliation was not a factor in his decisions surrounding Plaintiff's resignation from the Municipality.

We refused to summarily decide Defendant Ortiz' qualified immunity defense because there was a question of material fact as to whether Defendant Ortiz' decisions concluding with Plaintiff's resignation were motivated by political animus.

A district court's denial of qualified immunity may immediately appealable. See Mitchell v. Forseyth, 47 U.S. 511, 525-27 (1985). An interlocutory claim of qualified immunity that is immediately appealable divests the district court of jurisdiction. See Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992). "If the claim of immunity Is a sham, however, the notice of appeal does not transfer Jurisdiction to the court of appeals, and so does not stop the district court in its tracks." Apostol v. Gallion, 870 F. 2d 1335, 1339 (7th Cir. 1989). For instance, "a notice of appeal may be so baseless that it does not invoke appellate jurisdiction." Id. Furthermore, an appeal may be frivolous if it involves a question that the district court has not completely resolved. Id.

Here, our denial of summary Judgment turned on an unresolved issue of fact in a clearly established legal scenario strongly indicative of improper political discrimination. Under these circumstances, an appeal of an unresolved factual question is baseless and is not immediately appealable. See Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1, 7 (1st Cir. 2000) (internal citations omitted) ("Defendants may not file an immunity appeal

simply on the ground that they did not know what the plaintiffs allege."); Stella v. Kelley, 63 F.3d 71, 74 (1st Cir. 1995); see also Apostol, 870 F.2d at 1339. Therefore, we necessarily certify that Defendant's appeal is frivolous under the present circumstances.

B. Defendants' Other Arguments

Defendants also believe that we should have stayed the trial to allow them the opportunity to file a motion for reconsideration of our partial denial of summary judgment. Reconsideration, however, is not an indispensable pretrial right. Moreover, Defendants have not articulated which, if any, matters they would like us to reconsider here. Therefore, we decline to stay the proceedings based on this skeletal argument.

Next, Defendants argue that one of their attorneys, Johanna Emmanuelli Huertas, informed this court during the pretrial conference on July 31, 2002 that she would be unable to attend trial on December 2, 2002. Defendants have not identified anything in the record that supports this contention. Furthermore, we issued an order on July 31, 2002, which stated that the trial would begin December 2, 2002. Docket Document No. 54. If Defendants' attorney knew she had a scheduling conflict, she had five months to file a motion to that effect. Attorney Emmanuelli Huertas did not file a motion to reschedule trial until December 2, 2002, the date that trial was scheduled to begin.

Defendants further argue that by beginning trial on the scheduled date, we have forced the other attorneys in Emmanuelli Huertas' law firm to take the case without adequate preparation. The blatant shortcoming of this

argument is that Emmanuelli Huertas simultaneously maintains that she has known since July that she could not attend trial, As such, she had five months to seek assistance on the case from the other attorneys in her firm.

Attorney Emmanuelli Huertas claims that she knew on July 31, 2002 that she could not attend trial, yet she apparently chose not to enlist any of the other attorneys in her firm to help prepare the case for trial and she did not file a motion informing this court of her scheduling conflict until after trial was set to begin. These circumstances do not warrant a stay of proceedings.

III.

To conclude, this case involves what prima facie seems to be an instance where Plaintiff's career employment was improperly compromised and resulted in his resignation as a constructive discharge. Defendants opted to ignore a long established trial setting and now pretend not to face trial by attempting to divest this court of jurisdiction based on unavailable qualified immunity considerations. In accordance with the foregoing, the Motion to stay trial is DENIED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 26th day of December, 2002.

JOSE ANTONIO FUSTE
U.S. District Judge

FOOTNOTES

[1] Evidence at trial suggests that two independent Puerto Rico government entities, the Central Personnel Board and the Department of Labor, found that Defendants had engaged in improper employment actions against Plaintiff.

Civil No. 01-1244 (JAF)

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

SANTOS RIVERA TORRES, DAISY NAZARIO-SANTANT; YASIRA RIVERA-NAZARIO, and ZAHIRA RIVERA-NAZARIO,
Plaintiffs,

v.

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande; SABANA GRANDE MUNICIPALITY,
Defendants.

ORDER

The $60,000 award made by the jury to compensate for the net loss of wages and benefits of Plaintiff Santos Rivera-Torres to the date of trial is reduced from $60,ooo to $26,400 ($880 a month for thirty months lost wages from June 2000 to December 2002).

IT IS SO ORDERED.

San Juan, Puerto Rico, this the 9th day of December, 2002.

JOSE ANTONIO FUSTE
U.S. District Judge

Civil No. 01-1244 (JAF)

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

SANTOS RIVERA TORRES, et al.
Plaintiffs,

v.

MIGUEL G. ORTIZ VELEZ, et al.,
Defendants.

ORDER

On December 3, 2002, we began a jury trial in the present political discrimination case, On December 6, 2002, following the close of evidence, we met with the lawyers to review the jury instructions that this court had prepared. At that time, the issue of municipal liability was discussed. Since the parties had not provided an instruction on that issue, we searched for instructions that we had used in previous cases and found an jury charge regarding the issue of municipal liability in a political discrimination case, we showed the instruction to the attorneys, who did not oppose it, following the meeting with the attorneys, we charged the jury, including the previously mentioned instruction as to municipal liability, without remembering that the First Circuit had rejected this particular instruction in one of our cases in 1989. See Cordero v. De Jesus-Mendez, 867 F.2d 1, 7-8 (1st Cir. 1989).

On December 9, 2002, the jury returned a verdict in favor of Plaintiffs and awarded Plaintiffs substantial damages.

We now reappraise the instructions and verdict, and realize that in our haste, we made a mistake. Pursuant to Cordero, 867 F. 2d at 7, this court should not have instructed the jury as outlined in page fifteen of the jury instructions.[1] Moreover, we should not have submitted the issue of municipal liability to the jury as we erroneously did in question nine of the jury verdict.[2] At the time the jury verdict was returned, having received no input from the parties, we misspoke when we indicated that we would enter judgment dismissing the case against the Municipality of Sabana Grande.

We take this opportunity to correct our own error. Although the jury answered "No" to question nine and found that Defendant Ortiz-Velez did not act pursuant to a policy of the Municipality, the jury was not entitled to make such a determination. Pursuant to the holding in Cordero, Defendant Mayor Ortiz-Velez' employment decisions represent policies of the Municipality of Sabana Grande, and the Municipality is liable for Ortiz-Velez' actions as a matter of law. B67 F.2d at 7-8 (internal citations omitted).

As such, this court will not consider the jury's response to question nine of the jury verdict. The deletion of question nine does not impact the jury's finding of liability or its award of damages. The jury found that Defendant Ortiz-Velez, acting under color of state law, discriminated against Plaintiff Rivera-Torres because of his political beliefs and the jury awarded Plaintiff Rivera-Torres damages to compensate his for his lost

wages and emotional anguish. Under the legal framework applicable here, Defendant Municipality and Mayor Ortiz-Velez are both responsible for those damages.[3]

Therefore, pursuant to the jury's findings, we will enter judgment against. Defendants, Municipality of Sabana Grande and Mayor Ortiz-Velez,

IT IS SO ORDERED.

San Juan, Puerto Rico, this 10th day of December, 2002

JOSE ANTONIO FUSTE
U.S. District Judge

FOOTNOTES

[1] During the charge, we instructed the jury as follows: If the claimed unconstitutional conduct of the Mayor as a hiring authority is to hind the municipality of Sabana Grande, there must be proof by a preponderance of the evidence that the acts of the mayor were done pursuant to the policy of the Municipality of which he was the chief executive; that is, that the allegedly unconstitutional conduct was more than do isolated act of the mayor, In other words, you must find that the alleged conduct was that of the mayor and of the municipality which he heads. Try deciding this issue, you may consider the position and executive power of the mayor, his role in the municipality, and whether he acted in his official capacity.

[2] Question nine read: "Do you find by a preponderance of the evidence: That the claimed unconstitutional

conduct of the mayor as a higher authority was done pursuant to the policy of the municipality of Sabana Grande?"

[3] The jury assessed punitive damages against Defendant Miguel G. Ortiz Velez. Our decision to disregard question nine of the jury verdict does net effect the jury's explicit decision that Defendant Ortiz-Velez must pay punitive damages. The jury verdict form expressly and appropriately limited the granting of punitive damages to the acts of Defendant Ortiz-Velez, safeguarding Defendant Municipality from a punitive damages award. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981); see also Jury Charge p. 18-19 and Verdict Form Question Eight.

Civil No. 01-1244 (JAF)

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

SANTOS RIVERA TORRES, DAISY NAZARIO-SANTANT; YASIRA RIVERA-NAZARIO, and ZAHIRA RIVERA-NAZARIO,
Plaintiffs,

v.

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande; SABANA GRANDE MUNICIPALITY,
Defendants.

JUDGMENT

On the basis of the verdict returned by the Jury today and on the basis of a court order entered in relation to the verdict, judgment is entered as follows:

1. In favor of Plaintiff Santos Rivera-Torres and a against Defendants Miguel G. Ortiz-Velez and the Municipality of Sabana Grande:

(a) Lost wages and benefits: $26,400.00;

(b) Compensatory damages: $125,000.00.

2. In favor of Plaintiff Santos Rivera-Torres and against Defendant Miguel G. Ortiz-Velez:

(a) Punitive Damages: $250,000.00.

3. In favor of Plaintiff Daisy Nazario-Santos and against Defendant Miguel G. Ortiz-Velez and the Municipality of Sabana Grade:

(a) Compensatory Damages: $75,000.00.

4. In favor of Plaintiff Yasira Rivera-Nazario and against Defendant Miguel G. Ortiz-Velez and the Municipality of Sabana Grande:

(a) Compensatory Damages: $30,000.00.

5. In favor of Plaintiff Zahira Rivera-Nazario and against Defendants Miguel G. Ortiz-Velez and the Municipality of Sabana Grande:

(a) Compensatory Damages: $30,000.00.

San Juan, Puerto Rico, this 10th day of December, 2002.

JOSE ANTONIO FUSTE
U.S. District Judge

The First Amendment provides in relevant part:

> Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 USC § 1983 provides in relevant part:

> Every person who, under color of [law]...subjects...any citizen of the United States...to the deprivation of any rights...secured by the Constitution and laws, shall be liable to the party injured in an action at law...

Nos. 02-2539; 03-1074

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SANTOS RIVERA-TORRES; DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR,
Plaintiffs, Appellees,

v.

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande; MUNICIPALITY OF SABANA GRANDE, Defendants, Appellants.

August 26, 2003, Decided

COUNSEL: Johanna M. Emmanuelli Huertas, with whom Jorge Martinez-Luciano, and Law Offices of Pedro E. Ortiz-Alvarez, were on brief, for appellants.

Francisco R. Gonzalez for appellees.

JUDGES: Before Selya, Circuit Judge, R. Arnold, Senior Circuit Judge, * and Lipez, Circuit Judge.

OPINIONBY: LIPEZ

OPINION: LIPEZ, Circuit Judge. On February 21, 2001, plaintiffs Santos Rivera-Torres ("Rivera"), his wife (Daisy Nazario-Santana), and two daughters (Yasira Rivera-Nazario and Zahira Rivera-Nazario), n1

brought this claim against the municipality of Sabana Grande and four municipal officers pursuant to 42 U.S.C. § 1983. Rivera alleged that he was the victim of adverse employment actions motivated by political animus, in violation of the First and Fourteenth Amendments. After a series of preliminary orders removing three of the four individual defendants from the action, the trial began on December 3, 2002, against the municipality of Sabana Grande and Miguel Ortiz Velez ("Ortiz"), the mayor of Sabana Grande, who was sued in both his individual and official capacities. At the conclusion of the four-day trial, the jury found that "protected political activity was a substantial or motivating factor in the defendant's decision to politically discriminate against the plaintiff," and awarded Rivera $ 60,000 in lost wages and benefits, n2 $ 125,000 in compensatory damages, and $ 250,000 in punitive damages. The jury also awarded compensatory damages in the amount of $ 75,000 to plaintiff's wife, and $ 30,000 to each of plaintiff's daughters. With several alterations, the court entered judgment on the jury's verdict, and the defendants filed these timely appeals.

Defendants raise a plethora of objections to the proceedings below, challenging inter alia the court's denial of qualified immunity, its refusal to stay proceedings pending the resolution of an attempted interlocutory appeal, various evidentiary rulings at trial, the court's interrogation of a defense witness, and the validity of the jury's damage award. After careful review of the record, we reject defendants' challenges and affirm the judgment.

I.

In 1980, Rivera was hired by the mayor of Sabana Grande to work in various capacities at the municipal gym. n3 Plaintiff's duties included training boxers and weight lifters, teaching self-defense classes for children, and organizing weight lifting, boxing, gymnastics, and karate competitions at locations around Sabana Grande. Most municipal jobs in Puerto Rico are sub-classified as "career positions" (akin to civil service jobs) or "trust positions" (political appointments). Municipal employees are similarly designated "career" or "trust" employees. At all times, Rivera was a career employee, and his job was designated a career position. In 1992, twelve years after plaintiff was hired, the incumbent mayor promoted him to "be in charge of the gymnasium." Although this managerial post was originally a "trust position," the municipality reclassified it as a career job to facilitate plaintiff's promotion.

At the time of the promotion, Rivera was a member of the Popular Democratic Party ("PDP"), though his allegiances were gradually shifting to the New Progressive Party ("NPP"). Over the next six years, from 1992 to 1998, Rivera's tenure as manager of the municipal gym was uneventful, and the record indicates that he received only positive employment evaluations. In December 1998, plaintiff formally joined the NPP, and local party leaders asked him to run as the NPP candidate for mayor of Sabana Grande. One week later, plaintiff publicly accepted the party's mayoral nomination at an NPP "plebiscite" (caucus).

Rivera's candidacy created a potentially awkward work environment. His opponent in the mayoral election was

incumbent mayor Miguel Ortiz Velez, who also happened to be plaintiff's boss by virtue of being mayor. Rivera testified at trial that his relationship with Ortiz changed dramatically after he announced his candidacy. That month, after returning from a three-week vacation, plaintiff discovered that the telephone had been removed from his office in the gymnasium. Rivera also learned that the mayor was requesting daily reports on his work habits from other coworkers stationed at the gym. In March 1999, the mayor observed Rivera outside his "area" during working hours, and ordered his secretary to make notations on plaintiff's time card documenting his absence from work. When plaintiff confronted the vice-mayor of Sabana Grande over the incident, he received a thirty-day suspension for "being disrespectful to the vice-mayor." Rivera appealed this suspension to the Commonwealth's Board of Appeals for the Personnel Administration System ("JASAP"), which reversed his suspension and awarded Rivera thirty days' back pay. The Board's decision was affirmed on appeal to the Commonwealth's Court of Appeals, and the Puerto Rico Supreme Court denied certiorari.

In the aftermath of the JASAP proceedings, Rivera continued to experience harassment at work. The locks on the gym were changed to inhibit his access, and on one occasion Rivera found a stack of his personal and office documents torn up next to a trash can near his office. He was stripped of authority to direct the activities of subordinates at the gym, and he had several prolonged arguments with Ortiz at the gymnasium. On one occasion, the mayor ordered him to complete maintenance tasks that were not within the

scope of his duties. The defendants did not seriously dispute these incidents at trial.

In May 2000, Rivera sought and received an offer of state-level employment at the Commonwealth Department of Sports and Recreation in nearby Mayaguez. At the time, the head of the Sport Administration Department was Eric Labrador, a fellow member of the NPP. Because Puerto Rico law prohibits individuals from simultaneously holding state and municipal-level employment, Rivera petitioned the municipality for a transfer. However, Mayor Ortiz refused to approve Rivera's transfer. Rivera testified that the mayor's secretary informed him that "the mayor would not sign unimportant papers."

Rivera was anxious to accept the state-level position before the November 2000 elections, anticipating that the employment offer would be rescinded if a PDP administration were elected into office. Thus, on June 5, 2000, Rivera submitted an irrevocable letter of resignation to the municipality. The consequences of resigning in lieu of obtaining a transfer were severe. Plaintiff stood to sacrifice the twenty years of seniority he had accumulated since 1980 for salary and benefit purposes. However, even this initiative proved unavailing when Ortiz refused to accept Rivera's resignation, citing an ongoing investigation into Rivera's excessive absenteeism over the previous five months. Mayor Ortiz testified at trial that under Puerto Rico law, a municipality loses the authority to discipline a municipal employee once that employee has been transferred to a state agency. Hence, it was critical to delay plaintiff's transfer request until the

administrative investigation into his absenteeism had been resolved.

Rivera insisted that his absences were due to work-related illnesses, and he instructed his doctor, Silva Cherena, to submit medical reports to the municipality documenting his symptoms. Indeed, Dr. Cherena had sent plaintiff's medical information to the municipality on July 1, 2000. However, Mayor Ortiz's office claimed not to have received the doctor's letter until October 31, 2000. Two weeks later, Mayor Ortiz finally accepted Rivera's irrevocable resignation, nearly five-and-a-half months after it was tendered. In the intervening period, the NPP party had been voted out of key Commonwealth positions, and the job offer at the Commonwealth Department of Sports and Recreation was no longer available. Rivera was unable to find other work, and his family suffered significant financial and emotional hardship as a result.

In the opinion accompanying its November 26, 2002 order granting partial summary judgment to defendants, the district court distilled Rivera's accusations into five discrete allegations of political discrimination:1) In January 1999, Defendants removed the phone from Plaintiff's office;

2) In January 1999, Defendant Ortiz ordered Arenas, another employee of the Municipality, to take on Plaintiff's job duties, supervise Plaintiff, and track his movements;

3) In March 1999, Defendants falsely accused and unjustly suspended Plaintiff for leaving his work-area and being absent from work;

4) In April 2000, Defendant Ortiz refused to approve Plaintiff's transfer to the Commonwealth's Sports and Recreation Department in Mayaguez;

5) On June 28, 2000, Defendant Ortiz declined to accept Plaintiff's resignation and then intentionally deferred the decision, accepting the resignation only after the elections.The defendants conceded that Rivera had properly preserved allegations 4 and 5, but argued that the first three allegations were time-barred. The district court agreed, and dismissed allegations 1, 2 and 3 in its partial order of summary judgment on November 26, 2000. Of particular relevance to this case, the district court's November 26 order also denied Mayor Ortiz's request for qualified immunity. On December 3, 2002, the case proceeded to trial on Rivera's two preserved allegations of discrimination. The jury delivered its verdict on December 9, and these appeals followed.

II.

A. Pre-Trial Rulings

1. Denial of Summary Judgment

The defendants level a three-pronged attack on the district court's failure to dismiss Rivera's case outright on summary judgment. First, they argue that "the determination of the Court that plaintiffs had made out a prima facie case rested on evidence that was ultimately inadmissible at trial and on inferences from facts not properly on the summary judgment record." See Finn v. Consolidated Rail Corp. 782 F.2d 13, 16 (1st Cir. 1986) ("Material that would be inadmissible at trial

cannot be considered on a motion for summary judgment because, if offered at trial, it would not serve to establish a genuine issue of material fact."). Second, defendants allege that Rivera failed as a matter of law to proffer evidence sufficient to overcome summary judgment. Finally, defendants challenge the district court's denial of qualified immunity at the summary judgment stage.

These objections are unavailing. Because the appeal in this case follows a full trial and verdict, the district court's rulings at the summary judgment stage were "overtaken by subsequent events":We need not address the merits of [a] preverdict challenge to the sufficiency of the evidence on the motion for summary judgment. Such an attack on the denial of defendant's motion for summary judgment "has been overtaken by subsequent events, namely, a full-dress trial and an adverse jury verdict" . . . . The rationale for this rule has been based on the procedural fact that a denial of a motion for summary judgment "is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on issues on which summary judgment was sought." Hence, a challenge to the sufficiency of the evidence adduced on the motion to support the district court's conclusion that genuine issues of material fact exist will not lie on appeal.Eastern Mountain Platform Tennis, Inc. v. Sherwin-Williams, Co., 40 F.3d 492, 500 (1st Cir. 1994) (internal citations omitted). Although Eastern Mountain specifically references sufficiency of the evidence challenges, objections to the court's pre-trial denial of qualified immunity in its summary judgment ruling are subject to the same rule of trial preemption. As we noted in Iacobucci v. Boulter, 193 F.3d 14 (1st

Cir. 1999), that rule generally bars non-interlocutory appeals grounded solely in error at the summary judgment stage:Although [the defendant] tried in this forum to assign error to the denial of that motion, a pair of procedural impediments frustrates the attempt. For one thing, an order denying summary judgment typically does not merge into the final judgment and therefore is not an independently appealable event if the case thereafter proceeds to trial.Id. at 22 (citing Eastern Mountain, 40 F.3d at 497).

Consequently, although a post-trial grant of immunity would still confer a benefit on defendants by shielding them from any liability for monetary damages awarded by the jury, a defendant determined to persist in challenging the court's denial of qualified immunity cannot rest on the objection lodged at the summary judgment stage, but must move for judgment as a matter of law at the conclusion of the trial. If the court adheres to its original position, the defendant may then appeal from the denial of judgment as a matter of law. A contrary rule would contradict the principle enshrined in our jurisprudence that facts elicited at trial are often probative of the defendant's entitlement to qualified immunity. See Stella v. Kelley, 63 F.3d 71, 74 (1st Cir. 1995) (declining to permit interlocutory appeals from a court's rejection of qualified immunity "to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact"); 15A Wright, Miller & Cooper, Federal Practice and Procedure § 3914.10. ("Once trial has been had, the availability of official immunity [on final judgment of appeal] should be determined by the trial record, not the pleadings nor the summary judgment record.").

Here, defendants failed to properly preserve their challenge to the court's denial of qualified immunity by restating their objections in a post-trial motion for judgment as a matter of law. Accordingly, we deem the defendants' challenge waived.

2. A Forsyth Appeal

On December 2, 2002 -- nearly one week after the district court's ruling granting partial summary judgment and denying qualified immunity -- Ortiz filed a notice of appeal of the district court's decision to deny qualified immunity. In Mitchell v. Forsyth, 472 U.S. 511, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), the Supreme Court ruled that a defendant denied qualified immunity by a district court could file an interlocutory appeal to obtain review of any disputed question of law. "We hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." Forsyth, Id. at 530. The Forsyth Court reasoned that "the entitlement [to qualified immunity] is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Id. at 526 (emphasis in original).

The act of filing an interlocutory appeal has jurisdictional implications:The filing of . . . an interlocutory appeal, "confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 74

L. Ed. 2d 225, 103 S. Ct. 400 (1982) (per curiam). The district court does not regain jurisdiction over those issues until the court of appeals issues its mandate. Courts have carved out a few narrow exceptions to this rule, such as where the defendant frivolously appeals or takes an interlocutory appeal from a non-appealable order.United States v. Defries, 327 U.S. App. D.C. 181, 129 F.3d 1293, 1302-03 (D.C. Cir. 1997) (emphasis added). These exceptions to the jurisdictional rule recited in Defries figure prominently in the post-Forsyth jurisprudence of several circuits. In Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989), the court of appeals observed thatalthough [Forsyth] protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system . . . . Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take Forsyth appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal.Id. at 1338-39. In a subset of interlocutory appeals of qualified immunity rulings, the "notice of appeal may be so baseless that it does not invoke appellate jurisdiction" even when filed. Id. at 1339. To address other "sham" appeals whose lack of merit is not so transparent as to preclude the transfer of jurisdiction to the appellate court in the first instance, the Seventh Circuit developed a "certification" process whereby "a district court may certify to the court of appeals that the appeal is frivolous and [retrieve jurisdiction to] get on with the trial." Id. The court admonished thatsuch a power must be used with restraint, just as the power to dismiss a complaint for lack of jurisdiction because it is frivolous

is anomalous and must be used with restraint. But it is there, and it may be valuable in cutting short the deleterious effects of unfounded appeals.Id. Following the Seventh Circuit's lead, the Sixth, Ninth, and Tenth circuits established similar certification procedures to address interlocutory appeals challenging the denial of qualified immunity ("Forsyth appeals"). See Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992); Stewart v. Donges, 915 F.2d 572, 577 (10th Cir. 1990).

The circuits adopting this certification procedure have held or implied that the district court's act of filing the certification of frivolousness is an event of jurisdictional significance.It is the district court's certification of the defendant's appeal as frivolous or forfeited rather than merely the fact that the appeal is frivolous which allows the district court to retain jurisdiction to conduct a trial . . . . Once a notice of appeal on an appealable issue such as qualified immunity is filed, the status quo is that the district court has lost jurisdiction to proceed. To regain jurisdiction, it must take the affirmative step of certifying the appeal as frivolous or forfeited, and until that step is taken it simply lacks jurisdiction to proceed with the trial.Stewart, 915 F.2d at 577-78 (emphasis in original); see also Chuman, 960 F.2d at 105; Yates, 941 F.2d at 449; Apostol, 870 F.2d at 1339.

This proposition -- that a district court must actually file the certification of frivolousness to retrieve jurisdiction over the proceedings -- is the springboard for defendants' argument that the trial in this case was a nullity. On November 26, 2002, the district court initially entered an Opinion and Order denying defendants' pre-trial request for qualified immunity. On

December 2, defendants responded by filing a notice of appeal from the denial of immunity and moving the district court to stay the proceedings pending the resolution of the appeal. Immediately thereafter they petitioned this court for a stay of the district court proceedings. n4 Without the benefit of an order from the district court denying the motion to stay, we denied the requested stay in a summary order issued that same day:The motion to stay trial is denied. In denying appellants' motion for summary judgment based on qualified immunity, the district court stated that "Ortiz's motivation for denying and deferring Plaintiff's resignation is an unresolved issue of material fact." As appellants have not adequately explained why the denial is immediately appealable, see Stella v. Kelley, 63 F.3d 71, 74 (1st Cir. 1995) ("a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact"), the motion for stay is denied.

On December 3, 2002, the district court began the trial. Meanwhile, defendants had filed a motion for reconsideration of our December 2, 2002 order denying the stay. By order dated December 6, 2002, we rejected the defendants' motion for reconsideration:To the extent that defendant is asking this court to immediately stay any further trial, the request is denied. We request the district court, however, to expressly act on defendant's motion for stay. See Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) ("Should the district court find that the defendants' claim of qualified immunity is frivolous or

has been waived, the district court may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial"). Any renewed request for a stay filed in the court of appeals must be accompanied by sufficient portions of the record to allow for intelligent review.In the interim, however, the district court had nearly completed the trial. On December 6, after entertaining closing arguments and issuing instructions to the jury, the district court denied the defendants' motion for stay in an order dated that day:Our denial of summary judgment turned on an unresolved issue of fact in a clearly established legal scenario strongly indicative of improper political discrimination. Under these circumstances, an appeal of an unresolved factual question is baseless and is not immediately appealable. Therefore, we necessarily certify that Defendant's appeal is frivolous under the present circumstances.Rivera-Torres v. Ortiz-Velez, 2002 PR App. LEXIS 2882, Civil No. 01-1244 at 5-6 (D.P.R. December 6, 2002). Defendants now insist that "given the uncontested fact that the Trial Court proceeded without jurisdiction, the judgment entered in the instant case suffers from the incurable vice of nullity and must be vacated."

This jurisdictional dispute might have been avoided if the district court had promptly ruled on the defendants' motion to continue the trial pending the resolution of their Forsyth appeal. See Fed. R. App. P. 8(a) ("A party must ordinarily move first in the district court for . . . a stay of the judgment or order of a district court pending appeal."). Under well-settled law, courts entertaining a motion for stay are compelled to evaluate the merits of the petition and anticipate its

disposition on appeal. See Acevedo Garcia v. Vera-Monroig, 296 F.3d 13, 16 (1st Cir. 2002) ("The sine qua non of the stay pending appeal standard is whether the movants are likely to succeed on the merits.") (internal quotation marks and citation omitted). This evaluation closely resembles the frivolousness analysis required under the Apostol certification procedure, as the court's order of December 6 noting the unappealability of its qualified immunity ruling demonstrates. See supra. If the court had entered that order denying the stay on December 2, prior to beginning the trial, its jurisdiction over the proceedings would have been clearly established even without the inclusion of certification language in the opinion.

We have never adopted the Apostol certification procedure in this circuit. Although appellants urge us to do so here in the hopes of adding fuel to their trial nullity argument, we decline their invitation. Whatever the merits of the certification procedure may be, its primary innovation -- permitting the district court to reclaim jurisdiction from the court of appeals in the wake of a Forsyth appeal -- has no relevance to this case. The defendants' notice of appeal was patently meritless, and therefore failed to divest the district court of jurisdiction in the first instance. As we observed in United States v. Brooks, 145 F.3d 446 (1st Cir. 1998):like most rules, the rule that either the trial or the appellate court - but not both - may have jurisdiction over a case at any given point in time admits of some exceptions. Thus, a district court can proceed, notwithstanding the filing of an appeal, if the notice of appeal is defective in some substantial and easily discernible way (if, for example, it is based on an unappealable order) or if it otherwise constitutes a

transparently frivolous attempt to impede the progress of the case.Id. at 456. In this case, the defendants' interlocutory appeal was based on an unappealable order. As we ruled in Stella:a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact . . . in such a situation, the movant must await the entry of final judgment before appealing the adverse ruling.Stella, 63 F.3d at 74 (emphasis added). This principle, which we reiterated in our initial order denying defendants' request for stay, rendered the district court's denial of qualified immunity unappealable.

To avoid the application of this principle, appellants now lamely defend the legitimacy of their interlocutory appeal by arguing that the district court's qualified immunity determination turned on the legal question of whether a municipal officer's subjective intent is relevant to the qualified immunity analysis, and insisting that the court "improperly considered the element of subjective intent as part of the qualified immunity inquiry." Superficially, Ortiz draws support for his opposition from the Supreme Court's decision in Crawford-El v. Britton, 523 U.S. 574, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998), and our post-Crawford-El jurisprudence. See Tower v. Leslie-Brown, 326 F.3d 290, 296 (1st Cir. 2003); Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) ("Evidence concerning the officer's subjective intent is simply irrelevant to a qualified immunity defense."); Sheehy v. Town of Plymouth, 191 F.3d 15, 19 (1st Cir. 1999). To illustrate the flaw in Ortiz's argument, one must differentiate between constitutional violations that are strictly a

product of the perpetrator's actions, and offenses where the perpetrator's subjective intent is an essential element of the violation. For example, an individual's Fourth Amendment rights are violated by the very fact that a police officer arrests him without probable cause, regardless of the officer's subjective intentions at the time of the arrest. See Abreu-Guzman, 241 F.3d at 73. Similarly, a suspect who is interrogated by the police without being advised of his right to counsel suffers a Fifth Amendment injury regardless of the questioning officer's intent or motives. In these situations, the rule of Crawford-El sensibly excludes evidence of the officer's intent from the qualified immunity analysis.

On the other hand, subjective intent is an essential element of political discrimination. We have previously observed thatwhen a former government employee brings a First Amendment suit against his employer for taking an adverse employment action against him on the basis of his speech, the premier precedent is Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). Under the Mt. Healthy paradigm, the plaintiff must show both that his speech was constitutionally protected, and that it was a "substantial" or "motivating" factor for the adverse action taken against him.Stella, 63 F.3d at 74-75 (emphasis added). In other words, an employee's First Amendment right to be free from political discrimination is violated when the employer's adverse employment decision is motivated by the employee's political speech. Hence, the employer's subjective motive is an essential element of the constitutional violation itself, and cannot be divorced from the qualified immunity inquiry. Our previous decisions underscore the importance of the employer's subjective

intent in political discrimination cases:Harlow does not rule out the need to inquire into the actual reasons behind an official's conduct when the official's state of mind is a necessary component of the constitutional violation he allegedly committed . . . . The official's abnormal expertise in law, or his subjective, below par, lack of expertise, makes no difference. But determining whether defendant fired an employee for a discriminatory reason . . . is an altogether different matter.Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 45 (1st Cir. 1988). In Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1 (1st Cir. 2000), we similarly dismissed defendants' contention that subjective intent is irrelevant to qualified immunity, explaining that "the plaintiffs allege that they were terminated because of their political affiliation, a constitutional claim that has no meaning absent the allegation of impermissible motivation." Id. at 11. Accordingly, the proffered legal basis for the defendants' Forsyth appeal is meritless, having been foreclosed by our prior decisions in Feliciano-Angulo and Acevedo-Garcia, see supra, properly cited by the district court in its order denying defendants' request for a stay, and characterizing the interlocutory appeal as frivolous.

Finally, we must note that the circumstances surrounding the defendants' Forsyth appeal betray its frivolousness. The district court's order of December 6 denying Ortiz's motion to stay the proceedings recounts that after the defendants' motion for summary judgment was denied on November 26, 2002, counsel for defendants failed to appear in court on December 2, the day the trial was scheduled to begin. Defendants insisted that they were unable to proceed because Johanna M. Emmanuelli-Huertas, the counsel of record

for defendants, was simultaneously involved in another trial. The court rejected this excuse, sanctioned Emmanuelli's law firm, and rescheduled the trial for December 3. Later that day, Ortiz filed his notice of appeal, and immediately thereafter moved to stay the proceedings in the district court, asserting to the judge that "this Honorable Court lacks subject matter jurisdiction to submit co-defendant Ortiz-Velez to the rigors of trial." n5 The timing and haste of the defendants' notice of appeal reveals its intended purpose -- to cloak a request for postponement in Forsyth interlocutory raiments. See Apostol, 870 F.2d at 1338-39 ("Defendants may take Forsyth appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal.").

In summary, we conclude that appellants' notice of appeal never divested the district court of jurisdiction, and we reject the claim that the entire trial was a nullity.

B. The Trial

Defendants raise a handful of objections to the district court's evidentiary rulings and conduct at trial. We address these claims in the order they were raised on appeal.

1. The District Court's Admission of Evidence Regarding Dismissed Claims

Defendants argue that the district court erred in permitting the plaintiff to introduce evidence pertaining to allegations that were dismissed before

trial as time-barred. "In general, we review judgment calls that certain evidence is either irrelevant or cumulative for abuse of discretion." Yankee Candle Co., Inc. v. Bridgewater Candle Co., LLC, 259 F.3d 25, 47 (1st Cir. 2001). As noted above, the district court's grant of partial summary judgment disposed of Rivera's claims arising from 1) the January 1999 deprivation of office equipment, 2) the mayor's January 1999 decision to strip Rivera of his duties and authority, and 3) Rivera's March 1999 suspension for "disrespecting" the vice-mayor. Significantly, the district court's summary judgment order anticipated that evidence concerning these dismissed claims could still be admissible at trial as relevant background: "Although we need not decide the issue at this time, it is possible that the time-barred prior incidents will be admissible as relevant background evidence." Rivera-Torres v. Ortiz-Velez, Civil No. 01-1244 at 16 n.5 (D.P.R. November 26, 2002) (citing O'Rourke v. City of Providence, 235 F.3d 713, 726 (1st Cir. 2001)). Indeed, the Supreme Court has observed that "[a] discriminatory act which is not made the basis for a timely charge . . . may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977); see also O'Rourke, 235 F.3d at 726; Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 439 (1st Cir. 1997). The district court's prerogative to admit evidence of dismissed claims insofar as it provides relevant background for surviving claims is firmly established by our precedents, and we discern no abuse of discretion in the court's exercise of this prerogative.

The defendants also ground their objections to the admissibility of "dismissed claims" evidence in Federal Rule of Evidence 403, arguing that "once a jury has heard about all these alleged, and time-barred, actions taken against plaintiff . . . it becomes almost impossible to make a fair assessment of the subsequent issues, which are the ones actually being tried." We disagree. The nature and severity of the events underlying the dismissed claims (including the confiscation of Rivera's personal telephone, the gradual erosion of his authority, and his thirty-day suspension) pale in significance to events that form the predicate of his surviving claims -- the refusal to approve Rivera's transfer, and the delayed acceptance of his letter of resignation. The dismissed claims involve employment decisions that resulted in inconvenience or brief financial hardship; the surviving claims implicate adverse employment acts that threatened plaintiff's livelihood. Accordingly, there was no abuse of discretion in the district court's implicit determination that the unfairly prejudicial effect of this evidence did not outweigh its probative value.

2. Cross Examination by the Judge

During the cross examination of Mayor Ortiz, counsel for Rivera interrogated the mayor about why he insisted on investigating plaintiff's sick leave absences in lieu of permitting his transfer to a position with the Commonwealth. In the midst of this line of questioning, the judge interjected with several of his own questions, resulting in the following exchange between the judge and the witness:JUDGE: Well, there was no impediment in you giving him the transfer authorization irrespective of the investigation, correct?

WITNESS: Well, the fact of the matter is that the investigation had reflected that there had been improper use of the sick leave days. We would have to go to the municipality's regulations regarding the possibility of a violation of those regulations or of any law. And not doing so could have entailed a finding against us by the controller's office. It could be called negligence in the fulfillment of a supervisor's duties.

JUDGE: But even if he had been transferred, you could always have obtained relief from him if he had taken those days for the wrong reasons?

WITNESS: Well, at least regarding that aspect, he could have raised that matter when the letter was sent to Dr. Silva on June 25th. And then we would have consulted the attorney himself . . . or from OCALAR, which is the personnel agency for the Commonwealth which deals with these personnel affairs. And if they said this was okay, we would have issued the letter.

JUDGE: At this time when these things were happening had he already changed parties?

WITNESS: Yes, he was already a candidate. This was the year 2000.

JUDGE: Don't you think it would have been prudent to allow him to go to the Commonwealth and out of Sabana Grande so that you wouldn't have any more problems with him?

WITNESS: If we were to look at it from that point of view, it would have been beneficial for the municipality because we then would have had a regular position that

we could have filled. But the problem was that since he was under investigation we could not do so.

On appeal, defendants argue that this grilling of codefendant Ortiz, far from aiding the jury in understanding the evidence, was a cross examination, comprised mostly of leading and argumentative questions geared towards making the following point: the Mayor had no legal basis for denying plaintiff's transfer, this action was carried out while plaintiff was a candidate for Mayor, and defendant was not prudent in making this decision.The Federal Rules of Evidence provide that "the court may interrogate witnesses, whether called by itself or by a party." Fed. R. Evid. 614(b); see also United States v. Gonzalez-Soberal, 109 F.3d 64, 72 (1st Cir. 1997) ("It is well settled that the trial judge has a perfect right -- albeit a right that should be exercised with care -- to participate actively in the trial proper."). The judge's discretion to participate in the direct and cross examination of witnesses is cabined by the importance of maintaining an appearance of impartiality: There are, however, limits to the behavior that is permitted judges. For example, the judge's participation must be balanced; he cannot become an advocate or otherwise use his judicial powers to advantage or disadvantage a party unfairly. An inquiry into the judge's conduct of the trial necessarily turns on the question of whether the complaining party can show serious prejudice. Id. (internal citations and quotation marks omitted).

On the cold record before us, the district court's questions suggest some skepticism about the mayor's proffered justification for denying Rivera's transfer. Ideally, the district court should have avoided this

suggestion. However, given the brevity of the exchange and the mild nature of the questioning, we conclude that the district court's interjections did not result in "serious prejudice." Id. Furthermore, we find it significant that the judge issued a lengthy instruction to the jury that mitigated any prejudice arising from his interrogation of Ortiz.If I asked any questions, and I did ask questions in this case, which it is my duty to do so if I have to, you should not be influenced by anything that I said or did. The purpose of asking questions by me was to either highlight something that I thought was unclear from the evidence, something that was not developed by the lawyers that I thought should be developed or simply to give some perspective to the actual issue before the Court at that time.

Judges, federal judges, have the right to ask questions. They have the right to call witnesses. They have the right to actually comment into [sic] the evidence if they want to comment on the evidence. And there is nothing wrong with that. The important thing is that I am not here to lead you into any particular result. I am here to just try to give you, with the assistance of the lawyer, the presentation of the best evidence possible so that you can decide the issues of fact.(emphasis added). We have previously held that instructions of this nature may cure prejudice arising from a judge's active trial participation: "Any possible risk of prejudice to [defendant] as a result of the judge's questions was abated by the clear instruction to the jury that it should ignore any impression that his questions might have made on them." United States v. Henry, 136 F.3d 12, 19 (1st Cir. 1998); see also Van Leirsburg v. Sioux Valley Hosp., 831 F.2d 169, 173 (8th Cir. 1987). In the end, we

conclude that the district court's questioning of Ortiz did not give rise to reversible error.

3. Judicial Notice

At trial, the defense attempted to characterize the Commonwealth job for which Rivera sought a transfer as a "demotion" from his tenured position with the municipality. While the Commonwealth position was designated a "transitory, "or temporary position, Rivera testified on cross examination that he stood to receive tenure from the Commonwealth after he had held the new position for "some months." To counter the impact of this testimony, the defendants asked the district court to take judicial notice of the fact that under Puerto Rico law transitory appointments may not be converted into tenured appointments. The judge, however, rejected defense counsel's request:I can't take judicial notice of that for a reason. I have been dealing with this kind of case for over 16 years. And believe me, there are many instances in which a situation like this where the Puerto Rico government takes a person like this and takes a transitory position, puts the person in and down the road in two or three months they change it to a career position. That happens all the time . . . . It may be illegal. But I live in the real world. In the real world this happens every day in the Puerto Rico government. And this is -- this has been established by the case law. You have thousands of examples and there is no way I am going to instruct this jury about something that is not realistic.

Under the Federal Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within

the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(emphasis added). The district court is obligated to take judicial notice of such facts "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). Here the court, drawing upon its experience, determined that the fact offered for judicial notice did not fulfill the requirements of Rule 201(b) because Puerto Rico law governing the duration of "transitory" government appointments does not always correspond to the realities of government practice. Therefore, in the court's view, taking judicial notice of the letter of the law would have misled the jury. On appeal, defendants offer no persuasive rationale for reversing the court's reasonable application of Rule 201, and we decline to disturb the jury verdict on this ground. n6

4. Refusal to Continue Proceedings

Finally, defendants argue that the district court abused its discretion in refusing to continue the proceedings to avoid a trial conflict involving the defendants' counsel of record. See Macaulay v. Anas, 321 F.3d 45, 48 (1st Cir. 2003). The record reflects that both parties filed a joint pre-trial memorandum on July 21, 2002, and that the pre-trial conference was approved by the district court on July 31, 2002. On August 1, 2002, the district court docketed its order setting December 2, 2002 as the starting date of the trial. Attorney Emmanuelli's law firm, which employs fifteen attorneys, accordingly had four months' notice of the trial date, and four months to bring another attorney up to speed on the specifics of this case. Instead, Emmanuelli waited until

the day the trial was scheduled to begin to move the court for a continuance citing an irreconcilable conflict. These circumstances preclude any finding that the district court abused its discretion in denying the continuance.

C. Post-Trial Rulings

1. Damages

At the conclusion of the trial, the jury awarded Rivera and his family the following damages: 1) $ 60,000 to Rivera for lost wages and benefits; 2) $ 125,000 in compensatory damages to Rivera "for emotional pain and mental anguish" (pain and suffering); 3) $ 75,000 in compensatory damages to Rivera's wife for pain and suffering; 4) $ 30,000 in compensatory damages to each of plaintiff's daughters for pain and suffering; and 5) $ 250,000 in punitive damages to Rivera alone. Hence, the jury's award of back pay was the only component of the damage award compensating an economic injury. In a post-trial order, the district court sua sponte reduced this element of the damages from $ 60,000 to $ 26,400, ruling that "the verdict has to be adjusted on the issue of lost wages because the only evidence is lost wages. There is no evidence of loss of benefits." Plaintiffs do not contest the court's reduction of this award on appeal.

Where defendants properly preserve a challenge to the amount of compensatory damages awarded by the jury, "our inquiry is limited to determining 'whether the trial court abused its discretion in refusing to set aside the verdict as excessive.'" Anthony v. G.M.D. Airline Servs., Inc., 17 F.3d 490, 493 (1st Cir. 1994) (quoting

McDonald v. Fed. Labs., Inc. 724 F.2d 243, 246 (1st Cir. 1984)). The review of a preserved challenge to a punitive damages award "is de novo, and the award will stand unless we find it 'certain' that the amount in question exceeds that necessary to punish and deter the alleged misconduct." Romano v. U-Haul Int'l, 233 F.3d 655, 672 (1st Cir. 2000). In this case, however, Ortiz and the municipality did not move for a new trial after the jury delivered its verdict, or file a post-trial motion to reduce or set aside the verdict as excessive. We have long held that defendants who fail to preserve challenges to the jury verdict below forfeit review of those claims on appeal: "We generally will not review a party's contention that the damages award is excessive or insufficient where the party has failed to allow the district court to rule on the matter." O'Connor v. Huard, 117 F.3d 12, 18 (1st Cir. 1997); see Carlton v. H.C. Price Co., 640 F.2d 573, 577 (5th Cir. 1981) (no appellate review of allegedly excessive or inadequate damages available where trial court was not given the opportunity to exercise its discretion on the matter), cited with approval in Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 811 (1st Cir. 1988); Braunstein v. Massachusetts Bank & Trust Co., 443 F.2d 1281, 1285 (1st Cir. 1971) (denying review of claim that award was excessive because appellant failed to raise the issue before the district court).

In this circuit, claims "forfeited through ignorance or neglect" may still be subject to plain error review on appeal. Chestnut v. City of Lowell, 305 F.3d 18, 20 (1st Cir. 2002) (en banc) ("Failures to object, unless a true waiver is involved, are almost always subject to review for plain error."). However, after reviewing the record, we discern no plain error that "resulted in a miscarriage

of justice or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." Smith v. Kmart Corp., 177 F.3d 19, 28 (1st Cir. 1999). The jury's award of compensatory damages was amply supported by the record, particularly the trial testimony of Daisy Nazario-Santana (Rivera's wife), Yasira Rivera-Nazario (Rivera's elder daughter), and Zahira Rivera-Nazario (Rivera's younger daughter), as well as Rivera's own description of the mental and emotional suffering he endured after losing his job. The jury's punitive damage award was also well within acceptable bounds, given the reprehensibility of defendants' conduct and the resultant injuries inflicted on Rivera and his family. See State Farm Mut. Auto. Ins. Co. v. Campbell, 155 L. Ed. 2d 585, 123 S. Ct. 1513, 1520-21 (2003); BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-76, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996).

2. Municipal Liability

Question # 1 on the special verdict form asked the jurors to determine whether "the actions of the defendant were under the color of the authority of the state." The jury responded in the affirmative. Question # 9 then inquired whether "the claimed unconstitutional conduct of the mayor as a higher authority was done pursuant to the policy of the municipality of Sabana Grande." The jury responded to this question in the negative. Initially limiting its focus to Question # 9, the court remarked after hearing the verdict in its entirety that "According to [the special verdict form] the municipality did not have a policy. This thing was basically the mayor's thing. And I will then enter the appropriate judgment [in favor of the municipality]."

Upon further reflection, the court, citing to our decision in Cordero v. De Jesus-Mendez, 867 F.2d 1 (1st Cir. 1989), determined that it had erred in including Question # 9 on the special verdict form. In Cordero, we acknowledged the Supreme Court's holding in Pembaur v. City of Cincinnati, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986) that "municipality liability under § 1983 attaches where . . . a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Id. at 483-84 (emphasis added). The Cordero court subsequently noted that mayors in Puerto Rico are the government officials ultimately responsible for the employment decisions of the municipality:Under Puerto Rico law, one of the express powers given to mayors of municipalities is: "To appoint all the officials and employees of the municipal executive branch, and remove them from office whenever necessary for the good of the service, pursuant to the procedures provided herein." P.R. Laws Ann. tit. 21, ch. 155 § 3002(15) (1980). Id. at 7. Hence, Mayor Ortiz's employment decisions in the context of this case ipso facto "constituted the official policy of the municipality." Id. Therefore, as the district court correctly realized, the liability of the municipality could not be divorced from the mayor's liability in his official capacity. Because the jury expressly found in response to Question # 1 that "the [unlawful] actions of the defendant were under the color of the authority of the state," municipal liability automatically attached.

We applaud the district court's prompt efforts to cure its initial error, and affirm its decision to disregard Question # 9 on the special verdict form and enter

judgment against the municipality. Significantly, the jury's responses to Question # 1 and Question # 9 did not create an inconsistent verdict to be resolved in accordance with Rule 49 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 49. The jury's response to Question # 9 reflected its determination that the municipality had no freestanding laws or policies that allowed or encouraged the adverse employment decisions at issue. This determination was in no way inconsistent with its previous finding that the mayor, acting on his own initiative, discriminated against Rivera while discharging his duties as mayor. In the absence of a proper instruction, the jurors were unaware that Ortiz's actions as mayor were themselves the "policy" of the municipality. Given these circumstances, the district court's decision to disregard the jury's response to Question # 9 is in accord with our resolution of the identical problem in Cordero, see Cordero, 867 F.2d at 8, and did not unfairly prejudice the municipality.

We reiterate that the municipality's contention that "there is no evidence in the record, suggestive of the Mayor implementing any sort of municipal policy," simply misses the point. Ortiz had the authority to control the conditions of Rivera's employment by virtue of being the Mayor of Sabana Grande. The employment decisions he made in that capacity constituted the policy of the municipality under well-established precedent. See Pembaur, 475 U.S. at 483; Cordero, 867 F.2d at 7.

III.

Our exhaustive review of the record and the arguments

raised on appeal reveals no basis for disturbing the jury's liability determination or damage awards. The district court's entry of judgment on the verdict is affirmed.

So ordered.

FOOTNOTES

* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

n1 Because the claims brought by Rivera's wife and two daughters are derivative of Rivera's political discrimination claim, we designate Rivera the "plaintiff" and refer to the other co-plaintiffs by name where necessary.

n2 After the jury issued its verdict, the court sua sponte reduced the award for lost wages and benefits from $ 60,000 to $ 26,400. Rivera does not contest this reduction on appeal.

n3 The facts presented here are intended to convey a general impression of the case. We provide additional facts where they are pertinent to the legal analysis.

n4 The district court's order of December 6, 2002 indicates that defendants filed both their notice of appeal and request for a stay with the district court at 4:48 p.m. on December 2. Defendants also petitioned this court for a stay of the district court proceedings that same day, although the precise time this request was filed is not clear from the record.

n5 On appeal, defendants argue that they were prejudiced by the district court's insistence on moving ahead with the trial notwithstanding attorney Emmanuelli-Huertas's simultaneous engagement. "Attorney Martinez was faced with the daunting task of preparing to represent defendants at trial with less than 24 hours of preparation . . . . This situation put plaintiffs in an unfairly advantageous position, as they were represented by the attorney who handled their claims from the beginning while defendants were not." While we reject the merits of this argument, see infra, it plainly reveals the tactical considerations motivating the defendants' Forsyth appeal.

n6 Defendants cursorily argue that the district court erred in admitting tape recordings of disparaging statements about plaintiff made by Ortiz during his election campaign. They intimate that the tapes were not properly authenticated, but provide no developed analysis or legal authority to support their assertion. Accordingly, we deem the argument waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("Issues adverted to in a perfunctory fashion, unaccompanied by some effort at developed argumentation, are deemed waived.").

(2)

No. 03-898

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande, MUNICIPALITY OF SABANA GRANDE,
Petitioners,

v.

SANTOS RIVERA-TORRES, DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR,
Respondents,

On opposition for a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

From the Federal District Court of San Juan, Puerto Rico No. 01-1244 (JAF) and First Circuit Court of Appeals No. 02-2539; 03-1074

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March 2nd, 2004

QUESTION PRESENTED

1. Whether the district court retained jurisdiction over the case while appellants' interlocutory Forsyth appeal was pending before the Court of Appeals absent an Apostle certification that the appeal was frivolous.

2. Whether the First Circuit properly held that the district court's pretrial denial of qualified immunity based on the existence of an unresolved controversy of fact regarding defendant's motivation is an unappealable order because the state of mind element of the underlying constitutional claim merges with the qualified immunity inquiry.

3. Whether a reasonable officer in the Mayor's position would have understood that the decision to defer acceptance of a letter of resignation pending a personnel investigation pursuant to state law would violate the employee's clearly established rights.

4. Whether the deferred acceptance of a public employee's letter of voluntary resignation pending a personnel investigation into unauthorized absences pursuant to state law constitutes a municipal law, policy or custom in violation of that employee's constitutional rights.

5. Did the First Circuit Court of Appeals correctly affirm that jury below found that Petitioners engaged in flagrant political discrimination against Respondent Santos Rivera Torres?

6. Did the First Circuit Court of Appeals committed an error when confirm the verdict by the courts below, when the jury's findings are not attacked in the Petition for a Writ of Certiorari?

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INTRODUCTION

The jury below found that Petitioners engaged in flagrant political discrimination against Respondent Santos Rivera Torres, and the First Circuit Court of Appeals affirmed that verdict. No errors were committed by the courts below, and the jury's findings are not attacked in the Petition for a Writ of Certiorari. As discussed below, the legal contentions in that Petition are wholly without merit, and not such writ should be granted.

Before delving into the substance of Petitioners' erroneous arguments and misrepresentations, it should be noted that, hidden underneath Petitioners' certiorari request to this Court, is their counsel's attempt to cover-up their faults during the trial proceedings.[1] To this respect, the First Circuit Panel commented on circumstances not indicated in Petitioner's submission to this Court:

> [W]e must note that the circumstances surrounding the defendants' *Forsyth* appeal betray its frivolousness. The district court's order of December 6 denying Ortiz's motion to stay the proceedings recounts that after the defendants' motion for summary judgment was denied on November 26, 2002, **counsel for defendants failed to appear in court on December 2, the day the trial was scheduled to begin. Defendants insisted that they were unable to proceed because Johanna M. Emmanuelli-Huertas, the counsel of record for defendants, was simultaneously involved in another trial. The court rejected this excuse, sanctioned Emmanuelli's law firm, and rescheduled the trial for December 3.** Later that day,

---

[1] Petitioners also tried to cover-up each attempt to justify the deceitful termination of a 20-year-career municipal employee without due process, because such attempts backfired before the jury.

> Ortiz filed his notice of appeal, and immediately thereafter moved to stay the proceedings in the district court, asserting to the judge that "this Honorable Court lacks subject matter jurisdiction to submit co-defendant Ortiz-Velez to the rigors of trial." **The timing and haste of the defendants' notice of appeal reveals its intended purpose -- to cloak a request for postponement in *Forsyth* interlocutory raiments**. *See* Apostol, 870 F.2d at 1338-39 ("Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal."). (Emphasis supplied.)

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 97-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 57a-58a. Thus, despite a scheduling order entered months before the trial date, Petitioners' counsel (a 15-lawyer firm) simply opted not to appear for the first day set for trial. To save face and delay, first the trial, and then the implementation of the jury's verdict for Respondents, Petitioners' counsel have raised frivolous appeals all the way to this Court.

STATEMENT ON THE FACTS

Petitioners' exposition of the facts pertaining to the political discrimination they perpetrated upon Respondent Santos Rivera Torres is shallow, self-serving, and misleading. Respondents submit that a proper statement of the facts as determined by the jury below is found in the First Circuit Panel's holding, cited *verbatim* and unedited, as follows:

1. In 1980, Rivera was hired by the mayor of Sabana Grande to work in various capacities at the municipal gym. Plaintiff's duties included training boxers and weight lifters, teaching self-defense classes for children, and organizing weight lifting, boxing, gymnastics, and karate competitions at

locations around Sabana Grande. Most municipal jobs in Puerto Rico are sub-classified as "career positions" (akin to civil service jobs) or "trust positions" (political appointments). Municipal employees are similarly designated "career" or "trust" employees. At all times, Rivera was a career employee, and his job was designated a career position. In 1992, twelve years after plaintiff was hired, the incumbent mayor promoted him to "be in charge of the gymnasium." Although this managerial post was originally a "trust position," the municipality reclassified it as a career job to facilitate plaintiff's promotion.

2. At the time of the promotion, Rivera was a member of the Popular Democratic Party ("PDP"), though his allegiances were gradually shifting to the New Progressive Party ("NPP"). Over the next six years, from 1992 to 1998, Rivera's tenure as manager of the municipal gym was uneventful, and the record indicates that he received only positive employment evaluations. In December 1998, plaintiff formally joined the NPP, and local party leaders asked him to run as the NPP candidate for mayor of Sabana Grande. One week later, plaintiff publicly accepted the party's mayoral nomination at an NPP "plebiscite" (caucus).

3. Rivera's candidacy created a potentially awkward work environment. His opponent in the mayoral election was incumbent mayor [Petitioner] Miguel Ortiz Velez, who also happened to be plaintiff's boss by virtue of being mayor. Rivera testified at trial that his relationship with Ortiz changed dramatically after he announced his candidacy. That month, after returning from a three-week vacation, plaintiff discovered that the telephone had been removed from his office in the gymnasium. Rivera also learned that the mayor was requesting daily reports on his work habits from other coworkers stationed at the gym. In March 1999, the mayor observed Rivera outside his "area" during working hours, and

ordered his secretary to make notations on plaintiff's time card documenting his absence from work. When plaintiff confronted the vice-mayor of Sabana Grande over the incident, he received a thirty-day suspension for "being disrespectful to the vice-mayor." Rivera appealed this suspension to the Commonwealth's Board of Appeals for the Personnel Administration System ("JASAP"), which reversed his suspension and awarded Rivera thirty days' back pay. The Board's decision was affirmed on appeal to the Commonwealth's Court of Appeals, and the Puerto Rico Supreme Court denied certiorari.

4. In the aftermath of the JASAP proceedings, Rivera continued to experience harassment at work. The locks on the gym were changed to inhibit his access, and on one occasion Rivera found a stack of his personal and office documents torn up next to a trash can near his office. He was stripped of authority to direct the activities of subordinates at the gym, and he had several prolonged arguments with Ortiz at the gymnasium. On one occasion, the mayor ordered him to complete maintenance tasks that were not within the scope of his duties. The defendants did not seriously dispute these incidents at trial.

5. In May 2000, Rivera sought and received an offer of state-level employment at the Commonwealth Department of Sports and Recreation in nearby Mayagüez. At the time, the head of the Sport Administration Department was Eric Labrador, a fellow member of the NPP. Because Puerto Rico law prohibits individuals from simultaneously holding state and municipal-level employment, Rivera petitioned the municipality for a transfer. However, Mayor Ortiz refused to approve Rivera's transfer. Rivera testified that the mayor's secretary informed him that "the mayor would not sign unimportant papers."

6. Rivera was anxious to accept the state-level position before the November 2000 elections, anticipating that the employment offer would be rescinded if a PDP administration were elected into office. Thus, on June 5, 2000, Rivera submitted an irrevocable letter of resignation to the municipality. The consequences of resigning in lieu of obtaining a transfer were severe. Plaintiff stood to sacrifice the twenty years of seniority he had accumulated since 1980 for salary and benefit purposes. However, even this initiative proved unavailing when Ortiz refused to accept Rivera's resignation, citing an ongoing investigation into Rivera's excessive absenteeism over the previous five months. Mayor Ortiz testified at trial that under Puerto Rico law, a municipality loses the authority to discipline a municipal employee once that employee has been transferred to a state agency. Hence, it was critical to delay plaintiff's transfer request until the administrative investigation into his absenteeism had been resolved.

7. Rivera insisted that his absences were due to work-related illnesses, and he instructed his doctor, Silva Cherena, to submit medical reports to the municipality documenting his symptoms. Indeed, Dr. Silva Cherena had sent plaintiff's medical information to the municipality on July 1, 2000. However, Mayor Ortiz's office claimed not to have received the doctor's letter until October 31, 2000. Two weeks later, Mayor Ortiz finally accepted Rivera's irrevocable resignation, nearly five-and-a-half months after it was tendered. In the intervening period, the NPP party had been voted out of key Commonwealth positions, and the job offer at the Commonwealth Department of Sports and Recreation was no longer available. Rivera was unable to find other work, and his family suffered significant financial and emotional hardship as a result.

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-91 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 42a-45a. We must stress that the facts provided above (in language borrowed from the First Circuit Court of Appeals' holding) were determined by the jury, validated by the District Court Judge, and corroborated by the First Circuit Court of Appeals' review of the record.[2]

ARGUMENT

Respondents had to contend, through the trial phase and appeal before the First Circuit, with a plethora of baseless arguments by Petitioners; their strategy has been akin to throwing a bowl of spaghetti at a wall, in the wild hope that one strand will stick.[3] At this last appellate stage, Petitioners again raise frivolous arguments to delay the enforcement of the jury's verdict. Petitioners' first three arguments for the granting of certiorari stem from the same erroneous rationale that the Federal District Court lacked jurisdiction to proceed to trial. The fourth is an attempt to reargue, to this Court, the facts already determined by a jury.

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[2] In this Opposition, Respondents have attempted to point to each instance of misrepresentation in the Petition for Certiorari. However, given the comparative size of the resources of the parties (Petitioners are backed by the resources of the Commonwealth of Puerto Rico, and are represented by a 15-lawyer firm; while the undersigning is a solo practitioner), Respondents submit that any factual representation in the Petition for Writ of Certiorari that is inconsistent with the jury's findings (as summarized by the First Circuit Court -- cited above) should be disregarded by this Supreme Court.

[3] Petitioners included in their Reply to the First Circuit Court of Appeals the following statement: "Defendants' [Petitioners'] evidence presented in the Jury Trial was the same as described in their Dispositive Motions." But as much as these "justifications" for adverse employment actions were absurd in writing, they were more so when presented through testimony and documentary evidence. The evidence presented by Respondents was consistent, truthful, clear, and squarely substantiated at the trial. See Plaintiff's Undisputed Facts on, Docket-70, A-34B - Page 667 of the Joint Appendix. In contract, Petitioners' excuses and justifications were totally absurd and unbelievable.

None of these arguments come close to meriting a Writ of Certiorari. We address each such argument in turn.

I. RESPONSE TO PETITIONERS' CONTENTION ABOUT THE AVAILABILITY OF APPELLATE JURISDICTION WHEN THE DISTRICT COURT DENIES A PRETRIAL ASSERTION OF QUALIFIED IMMUNITY ON A PERCEIVED ISSUE OF FACT

Petitioners' Forsyth and Apostol arguments are misplaced, as the First Circuit Court was correct in finding that Petitioners' notice of appeal was frivolous. The District Court never lost jurisdiction over the instant case and/or to conduct the trial proceedings because: (i) Petitioners did not adequately explain before the Court of Appeals why the denial of their motion for summary judgment was immediately appealable; (ii) the appeal was patently meritless; and (iii) it constituted a transparently frivolous attempt to impede the progress of the case.[4] At this point of departure, it is useful to note the procedural developments below, as described by the First Circuit Panel:[5]

> [...] On November 26, 2002, the district court initially entered an Opinion and Order denying defendants' pre-trial

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[4] In their heading for the corresponding section in the Petition, Petitioners summarize their first argument for certiorari as the need to resolve a conflict between the circuits as to the availability of appellate jurisdiction where the district court denies a pretrial assertion of qualified immunity on the basis of a perceived issue of fact. Petition, at 5. However, the basis for this argument gets lost in the exposition. Thus, we cover what we perceive are Petitioner's arguments in this section.

[5] The First Circuit Court decided not to stay the commencing jury trial. See Order dated December 2, 2002, District Court Docket-80, Joint Appendix for the 1st Circuit Ex-40, Page-709).

request for qualified immunity. On December 2, defendants responded by filing a notice of appeal from the denial of immunity and moving the district court to stay the proceedings pending the resolution of the appeal. Immediately thereafter they petitioned this court for a stay of the district court [trial] proceedings. Without the benefit of an order from the district court denying the motion to stay, we denied the requested stay in a summary order issued that same day:

> "The motion to stay trial is denied. In denying appellants' motion for summary judgment based on qualified immunity, the district court stated that 'Ortiz's motivation for denying and deferring Plaintiff's resignation is an unresolved issue of material fact.' As appellants have not adequately explained why the denial is immediately appealable, see Stella v. Kelley, 63 F.3d 71, 74 (1st Cir. 1995) ("a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact"), the motion for stay is denied."

On December 3, 2002, the district court began the trial. Meanwhile, defendants had filed a motion for reconsideration of our December 2, 2002 order denying the stay. By order dated December 6, 2002, we rejected the defendants' motion for reconsideration:

> "To the extent that defendant is asking this court to immediately stay any further trial, the request is denied. We request the district court, however, to expressly act on defendant's motion for stay. See Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) ('Should the district court find that the defendants' claim of qualified immunity is frivolous or has been waived, the district court

may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial'). Any renewed request for a stay filed in the court of appeals must be accompanied by sufficient portions of the record to allow for intelligent review."

In the interim, however, the district court had nearly completed the trial. On December 6, after entertaining closing arguments and issuing instructions to the jury, the district court denied the defendants' motion for stay in an order dated that day:[6]

"[O]ur denial of summary judgment turned on an unresolved issue of fact in a clearly established legal scenario strongly indicative of improper political discrimination. Under these

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[6] It is important to note that, Petitioners have, once and again, made reference to isolated excerpts taken out of context from the District Court's Opinion and Order, trying to convey the idea, first to the First Circuit Court of Appeals, and now to this Supreme Court, that the qualified immunity defense was denied at the summary judgment stage solely "because the defendant's actual motive is unresolved, but no other factual dispute remains." See Petition, at 8, 12, and 15. That representation is untrue, as the District Court identified significant factual issues that precluded summary judgment. This Court will confirm the inaccuracy -- not to say the outright falsity -- of such a statement just by a cursory glance at the District Court's Opinion and Order, which we reproduce at length for the sake of accuracy:

"Defendants maintain that they have satisfied this burden because they were investigating Defendant for frequent absences from work. Defendant Ortiz submits an affidavit stating that by the time he received the request for the transfer in April 2000, his office was investigating Plaintiff's poor attendance record. Defendant Municipality's Human Resources Director, Migdalia Rodríguez, also attests that she began an investigation into Plaintiff Rivera Torres' excessive absences in April 2000. However, neither Ortiz nor Rodríguez actually attests that this investigation was the reason they denied the transfer. Furthermore, Defendants have not submitted any evidence that a fledgling investigation into an employee's record of absenteeism is a sufficient basis to deny a transfer or that this was normal procedure. Without evidence to this effect, we necessarily find that Defendants have not satisfied their burden."

> circumstances, an appeal of an unresolved factual question is baseless and is not immediately appealable. Therefore, we necessarily certify that Defendant's appeal is frivolous under the present circumstances." *Rivera-Torres v. Ortiz-Velez,* Civil No. 01-1244 at 5-6 (D.P.R. December 6, 2002).

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-94-95 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 51a-53a.

Faced with this background, Petitioners attempt to ground their argument on an interpretation of the Apostol certification process for Forsyth appeals. However, the First Circuit Panel below correctly found it unnecessary to engage in such an analysis, finding dispositive that the notice of appeal was frivolous.[7] As that Circuit Court Panel indicated:[8]

> We have never adopted the Apostol certification procedure in this circuit. Although appellants urge us

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[7] Petitioners rest on that the District Court "fail[ed] to certify frivolousness before proceeding to trial." The fact is that the petitioners' appeal was filed on December 2, 2002, but the trial was rescheduled to the next day (because Petitioners' counsel did not show up for trial on December 2), when their appeal had already being rejected by the Court of Appeals. In addition, the grounds for Petitioners' appeal were insufficient, as were those submitted in their motion for summary judgment motion (which was rejected by the District Court). Most importantly, while the Petitioners requested the First Circuit to stay the trial proceedings on the basis of the appeal submitted, the First Circuit Court also denied such a motion through the Order issued on December 2, 2002. Thus, the First Circuit Court at that point found the district court to have jurisdiction to continue with trial proceedings. Therefore, there is no basis to find that the District court lacked jurisdiction the following day.

[8] Respondents' counsel apologizes to the Court for the long citations to the decision of the First Circuit Court below, but such decision aptly dealt with Petitioner's arguments before this Court.

to do so here in the hopes of adding fuel to their trial nullity argument, we decline their invitation. Whatever the merits of the certification procedure may be, its primary innovation-- permitting the district court to reclaim jurisdiction from the court of appeals in the wake of a Forsyth appeal--has no relevance to this case. The defendants' notice of appeal was patently meritless, and therefore failed to divest the district court of jurisdiction in the first instance. As we observed in United States v. Brooks, 145 F.3d 446 (1st Cir. 1998):

> "[l]ike most rules, the rule that either the trial or the appellate court--but not both--may have jurisdiction over a case at any given point in time admits of some exceptions. Thus, a district court can proceed, notwithstanding the filing of an appeal, if the notice of appeal is defective in some substantial and easily discernible way (if, for example, it is based on an unappealable order) or if it otherwise constitutes a transparently frivolous attempt to impede the progress of the case." Id. at 456. In this case, the defendants' interlocutory appeal was based on an unappealable order. As we ruled in Stella:[9]
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> "a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact ... in such a situation, the movant must await the entry of final judgment before appealing the adverse ruling."
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> Stella, 63 F.3d at 74 (emphasis added). This principle, which we reiterated in our initial order

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[9] Stella v. Kelly, 63 F.3d 71, 74 (1st Cir. 1993).

> denying defendants' request for stay, rendered the district court's denial of qualified immunity unappealable. Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 54a-57a.

Petitioners' notice of appeal to the First Circuit was frivolous and thus never divested the District Court of jurisdiction. But, even if such appeal had been based on other legal grounds that could have been capable of depriving the District Court of jurisdiction, Petitioners' interpretation of the operation of the Forsyth and Apostol holdings is erroneous, and thus do not support a writ of certiorari from this Court.

In Griggs v. Provident Consumer Discount Co., 103 S.Ct. 400 (1982), this Court established that, upon the notice of appeal, jurisdiction is conferred on the appellate court, and the district court is deprived of jurisdiction over "those aspects of the case." Petition, at 8 (citing Griggs, 459 U.S. at 511). However, as the Circuit Court below pointed out, "[c]ourts have carved out a few narrow exceptions to this rule, such as where the defendant frivolously appeals or takes an interlocutory appeal from a non-appealable order." Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-91 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 50a (citing U.S. v. Defries, 129 F.3d 1293 (D.C. Cir. 1997)). These exceptions mentioned in Defries have found a useful place in the jurisprudence of several circuits when dealing with frivolous Forsyth appeals. In Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989), the Seventh Circuit was correct in noting that "although [Forsyth] protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system... Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding

unjustified appeals. Defendants may take [...] appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal."[10] With regard to qualified immunity rulings, the "notice of appeal may be so baseless that it does not invoke appellate jurisdiction" even when filed. Id., at 1339. Thus, the "certification procedure" was developed to allow the district courts to prevent such frivolous appeals from achieving these improper purposes: "a district court may certify to the court of appeals that the appeal is frivolous and [retrieve jurisdiction to] get on with the trial." Id. This certification process has become indispensable in qualified immunity cases as adopted by the Sixth, Ninth, and Tenth Circuits. See Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992); and Stewart v. Donges, 915 F.2d 572, 577 (10th Cir. 1990).[11] And, while the Supreme Court has not formally

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[10] Even if Respondents were correct in their assertion that there exists a conflict between circuit's courts as to these legal precepts, the present case is not the appropriate instance for this High Court to impart instruction. The adage is that bad cases make bad law; and this is a very bad case for this Court to employ. As Petitioners admit in their Petition, "[c]ourts have been wary of the potential for defendant officials to abuse the Forsyth interlocutory review mechanism by customarily seeking appellate review of the pretrial denial of qualified immunity, even in patently unmeritorious cases, with the sole purpose of stalling litigation." Were this case to merit certiorari, it would be to affirm the Circuit Court's decision, but, all things considered, the nuances of the trial proceedings, aggravated by Petitioner's own faults, make this case a bad selection as the basis for this Court to establish a rule of law. Consequently, certiorari should be denied.

[11] In trying to provide support for their arguments, Petitioners made reference to Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990), as being analogous to the present case. That holding is from the 10th Circuit, and was therefore not controlling over the courts below. More important to this Supreme Court is that the Stewart holding is in fact materially distinguishable from the present case, since in Stewart the appellate court had not denied the stay of proceedings below, and did not instruct the district court to make a determination as to the certification. In the present case, the Court of Appeals denied the request

validated the certification process instituted, it has recognized its purpose and value: "This [certification] practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes the disruption of the ongoing proceedings." Behrens v. Pelletier, 516 U.S. 299, 310-11 (1996). Therefore, the certification process has been adopted by several circuits to allow the proceedings to continue their course in the face of a frivolous appeal; and such an appeal was filed by Petitioners in this case. As the Circuit Court below shrewdly identified, this *Forsyth* appeal fell under that category: a desperate attempt to postpone the trial because Petitioners' counsel failed to appear for the first day of trial and was subsequently unprepared (not that better preparation could have helped Petitioners' case). Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-91 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 42a-45a.

Lastly, Petitioners suggest that "firm guidelines as to the certification proceedings" should be set by this Court. Maybe so, but this is not the case for such conventions, as no error was committed by the courts below. The District Court conducted the trial with full jurisdiction, and complied with the instructions issued by the First Circuit Court regarding jurisdiction. It should be considered, above all, that, even if Petitioners were correct in their arguments (which we dispute), it would be fundamentally unfair for this Honorable Supreme Court to decree now that the District Court lacked jurisdiction, specially given the Circuit Court's Orders of December 2 and 5. Also, considering the judicial resources

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for a stay of trial proceedings (thus recognizing the trial court's jurisdiction to carry on with trial), and instructed the District Court to make a determination as to the certification (thus indicating that no error had been committed).

spent on trial, and the resolution of the factual controversies by way of a jury verdict, it makes no sense for this Court to find that the District Court lacked jurisdiction, especially since the Circuit Court denied the stay of proceedings for the same reason the District Court denied Petitioners' Summary Judgment Motion: "a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact."

II. RESPONSE TO PETITIONERS' CONTENTION ABOUT THE ROLE OF SUBJECTIVE INTENT IN QUALIFIED IMMUNITY ANALYSIS

The Petition for Certiorari states that the "merits of the qualified immunity pleas of Petitioner Ortiz have never been heard, neither by the lower nor the intermediate tribunals. The sole reason for this is that the district court found that there was a factual dispute as to whether defendant's subjective motivations were moved by partisan politics." See Petition, at 15. These assertions completely ignore the fact that a trial before a jury was held and what the District Court determined, on page 21 of its Opinion and Order, issued on November 26, 2002, that: "Defendants have not submitted any evidence that a fledgling investigation into an employee's record of absenteeism is a sufficient basis to deny a transfer or that this was normal procedure." See Petition, at 17a.

A fortiori, petitioners had ample opportunity to present their qualified immunity pleas, which were unambiguously and repeatedly rejected. Likewise, the District Court was also correct as a matter of law in denying the qualified immunity defense at the summary judgment stage as we shall demonstrate in the foregoing discussion.

The First Circuit Court dismissed this argument from Petitioners, indicating that:

> To avoid the application of this principle, appellants now lamely defend the legitimacy of their interlocutory appeal by arguing that the district court's qualified immunity determination turned on the legal question of whether a municipal officer's subjective intent is relevant to the qualified immunity analysis, and insisting that the court "improperly considered the element of subjective intent as part of the qualified immunity inquiry." Superficially, Ortiz draws support for his opposition from the Supreme Court's decision in Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed. 2d 759 (1998), and our post-Crawford-El jurisprudence. See Tower v. Leslie- Brown, 326 F.3d 290, 296 (1st Cir. 2003); Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) ("Evidence concerning the officer's subjective intent is simply irrelevant to a qualified immunity defense."); Sheehy v. Town of Plymouth, 191 F.3d 15, 19 (1st Cir. 1999). To illustrate the flaw in Ortiz's argument, one must differentiate between constitutional violations that are strictly a product of the perpetrator's actions, and offenses where the perpetrator's subjective intent is an essential element of the violation. For example, an individual's Fourth Amendment rights are violated by the very fact that a police officer arrests him without probable cause, regardless of the officer's subjective intentions at the time of the arrest. See [Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cit. 2001). Similarly, a suspect who is interrogated by the police without being advised of his right to counsel suffers a Fifth Amendment injury regardless of the questioning officer's intent or motives. In these situations, the rule of Crawford-El sensibly excludes evidence of the officer's intent from the qualified immunity analysis.

On the other hand, subjective intent is an essential element of political discrimination. We have previously observed that:

> "[w]hen a former government employee brings a First Amendment suit against his employer for taking an adverse employment action against him on the basis of his speech, the premier precedent is Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). Under the Mt. Healthy paradigm, the plaintiff must show both that his speech was constitutionally protected, **and that it was a `substantial' or `motivating' factor for the adverse action taken against him**."
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> Stella, 63 F.3d at 74-75 (emphasis added). In other words, an employee's First Amendment right to be free from political discrimination is violated when the employer's adverse employment decision is motivated by the employee's political speech. Hence, the employer's subjective motive is an essential element of the constitutional violation itself, and cannot be divorced from the qualified immunity inquiry. Our previous decisions underscore the importance of the employer's subjective intent in political discrimination cases:
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> > "Harlow [v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982)] does not rule out the need to inquire into the actual reasons behind an official's conduct when the official's state of mind is a necessary component of the constitutional violation he allegedly committed.... [T]he official's abnormal expertise in law, or his subjective, below par, lack of expertise, makes no difference. But determining whether defendant fired an employee for a discriminatory reason ... is an altogether different matter."

> Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 45 (1st Cir. 1988). In Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1 (1st Cir. 2000), we similarly dismissed defendants' contention that subjective intent is irrelevant to qualified immunity, explaining that "[t]he plaintiffs allege that they were terminated because of their political affiliation, a constitutional claim that has no meaning absent the allegation of impermissible motivation." Id. at 11. Accordingly, the proffered legal basis for the defendants' Forsyth appeal is meritless, having been foreclosed by our prior decisions in Feliciano-Angulo and Acevedo-Garcia, see supra, properly cited by the district court in its order denying defendants' request for a stay, and characterizing the interlocutory appeal as frivolous.

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 54a-57a.

Pursuant to First Circuit case law, determining whether qualified immunity is available to a particular defendant at a particular time requires a trifurcated inquiry. First is whether the plaintiff has alleged the violation of a constitutional right. If so, the next question is whether the contours of the right were sufficiently established at the time of the alleged violation. The final step is determining whether an objectively reasonable official would have believed that the action taken or omitted violated that right. Hatch v. Dept. of Children, Youth and their Families, 274 F.3d 12, 20 (1st Cir. 2001). That is, the threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation. Despite their participation in this

constitutionally impermissible conduct, the defendants may nevertheless be shielded from liability for civil damages if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Hope v. Pelzer, 536 U.S. 730, 746 (2002). Furthermore, as this Supreme Court explained in Hope, qualified immunity operates to ensure that, before they are subjected to suit, officers are on notice their conduct is unlawful, because for a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see Mitchell [v. Forsyth, 472 U.S. 511,] 535, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987)." (Emphasis added).

The law applicable to the present case has reached "black letter" status. See, e.g., Rutan v. Republican Party of Illinois, 497 U.S. 62, 75 (1990) (holding that promotions, transfers, and recalls after layoffs based on political affiliation are examples of impermissible deprivations less harsh than dismissal, that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy) ("[T]he First Amendment . . . already protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'" Id. at 76 n.8). See, also, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543 n.8, 545-546 (1985) ("[W]here there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course

of action is also an appropriate one") ("It should be an initial check against mistaken decisions --essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."). As this Court settled in Anderson, 483 U.S. at 640, "the very action in question has previously been held unlawful."

Accordingly, this is not a case of "mistaken judgment" for which Petitioners can escape liability. Because the law was clearly established at the time when Petitioners denied Respondent's request of transfer and subsequent resignation, with a discriminatory political animus and without a previous hearing, Petitioners are simply not entitled to qualified immunity. See Harlow, 457 U.S. at 819. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, she should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. El Día, Inc. v. Rosselló, 165 F.3d 106, 110 (1st Cir. 1999).

While the first two prongs of the qualified immunity analysis deal with abstract legal principles, the final step deals directly with the facts of the particular case. Hatch v. Dept. of Children, Youth, *supra*. The question here is whether Petitioner Ortiz Vélez had any legitimate reason, sufficient to deny Respondent's request of transfer and subsequent resignation without a previous hearing. As mentioned before, to that effect the District Court determined on page 21 of its Opinion and Order: "Defendants have not submitted any evidence that a fledgling investigation into an employee's record of absenteeism is a sufficient basis to deny a transfer or that this was normal procedure." Petition, at 17a. This Court's review of the record below will confirm that conclusion, and that should be the end of the road for

this argument. Still, *arguendo*, even if there might once have been a question regarding the constitutionality of this practice (which is not the case), the First Circuit precedents, as well as of the laws of the Commonwealth of Puerto Rico, certainly put a reasonable officer on notice that postponing indefinitely Respondent's request of transfer and his subsequent resignation, without a previous hearing under the circumstances alleged by him, was unlawful. In addition, the applicable Commonwealth regulations provided that the matters subject to Petitioner Ortiz Vélez consideration had to be determined in less than 15 days. See, Nazario Acosta v. Estado Libre Asociado, 2003 TSPR 116, Judgment Entered by the Supreme Court of Puerto Rico (without an Opinion) on June 30, 2003, at 549 (holding that, once the timeline for concluding the investigation and the subsequent filing of charges has expired, the government had two options; either it had to file charges in order for the employee to have the opportunity to be heard recognizing his due process rights; or, on the contrary, it had to declare the investigation as concluded; the government was held to have been negligent when it did not act in either of the ways described). Accordingly, the "fair and clear warning" provided by these legal enactments was sufficient to preclude the defense of qualified immunity at the summary judgment stage. Hope v. Pelzer, *supra*.

Thus, in order to decide the petitioners' summary judgment motion, the court faced a factual dispute as to whether Respondent was denied due process, and/or whether Petitioners' decisions and actions were in fact motivated by a discriminatory animus in response to Respondent Rivera Torres' exercise of his rights of free speech and association under the First Amendment of the Constitution of the United States of America. On the basis of the evidence presented, the jury found that, once Respondent Rivera Torres' became

a member of the NPP and a mayoral candidate; he suffered a rash of discriminatory behavior at the hands of his supervisors and municipal officers. Furthermore, this factual dispute is material because it shall determine whether there is a causal link between the denial of Respondent's request of transfer and the subsequent resignation without a previous hearing, and his affiliation with the NPP. Padilla García v. Rodríguez, at 77. In this context, a highly charged political atmosphere coupled with the fact that Respondent and Petitioners were of competing political persuasions was part of the proof of discriminatory animus. Id. at 75.

That is, the evidence presented to the District Judge at the summary judgment phase, and then accepted by the jury at trial, is that: (i) it was well known that Respondent Rivera Torres was a member of the NPP and a mayoral candidate against Petitioner Ortiz Vélez (who prevailed in being elected to that office); (ii) the election left serious conflict between the two opposed political partisan groups; and (iii) that the circumstantial evidence (validated by the jury) was that Respondent was a "conspicuous target."[12] These facts, and others determined by the jury on the basis of the evidence presented at trial, constitute basis of material,

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[12] In this regard, the evidence on the record is also that Petitioners requested from Respondent's physician his medical records, which were provided in early July 2000 -- contrary to Petitioners' allegation that the letter was "received" on October 31, 2000. In the meantime -- on September 20, 2000 -- Petitioner Ortiz Vélez (the Mayor) had publicly said, on a publicly-broadcasted radio program, that Respondent was being investigated for being a "crook", and about his "absenteeism"; and it was not until November 13, 2000 that the Mayor accepted Respondent's resignation (five months after the 15-day term provided by the controlling regulations). According to Petitioners at trial, that was the "shortest time possible," as stated in the letter by the Human Resources Director, denying Respondent's resignation on June 5, 2000. A review of the record will confirm the jury's understanding of these facts, and will show how every one of Petitioners' defenses in their Summary Judgment Motion and the Jury Trial backfired against them as untruthful.

factual, trial-worthy issues related to Petitioners' politically-discriminatory animus and conduct, and thus effectively barred summary judgment.[13] Padilla García v. Rodríguez, 212 F.3d 69, 75 (2000).

All of the above stated, coupled with the undeniable certainty of the standard applicable to the qualified immunity defense in regard to the reasonableness of the action taken by the officer, renders Petitioners' misinterpretation of Harlow v. Fitzgerald, 457 U.S. 800 (1982), a frivolous contention before this Court.[14] None of the excerpts of Crawford-El v.

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[13] In order to determine whether the factual dispute between the parties is "material", the substantive law will identify which facts meet that threshold. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991); 10 A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure & 2725 at 93-95 (1983). Certainly the facts in this case are of a nature that meets that threshold. Note also that, in some circumstances, pre-trial resolution will be impossible because of a dispute as to material facts. See Swain v. Spinney, 117 F.3d 1, 9-10 (1st Cir. 1997) (noting that the objective reasonableness inquiry is "highly fact specific"). In such a case, the factual issues must be decided by the trier of fact thereby precluding summary judgment. Id. Only after the facts have been settled can the court determine whether the actions were objectively reasonable so as to fall under the qualified immunity umbrella. Id.

[14] Petitioners support their assertion on a quite unique reading of well-settled case law on qualified immunity, which is at the same time the best support for the District Court's certification that their Forsyth appeal was frivolous. See 2 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, § 8:15, at 8-50 (4th ed. 20[illegible]

> "The reasoning and result in Crawford-El were sound. The Court wisely prevented qualified immunity from substantially undermining § 1983 constitutional claims based on impermissible motivation, including First Amendment, Eighth Amendment, due process and equal protection claims. Thus, Crawford-El did not work any great change in current case law. In contrast, the four dissenters would frankly have allowed the policy considerations underlying qualified immunity to eliminate many such claims. In their view, the cost of those violations were worth

Britton, 523 U.S. 574, 588-589 (1998), as offered by petitioners in their Petition support their interpretation whatsoever. Simply put, the Supreme Court in Crawford-El v. Britton, *supra,* explained its holding:

> "Our holding that 'bare allegations of malice' cannot overcome the qualified immunity defense did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation. It is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim. It is equally clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated. For example, A. Ernest Fitzgerald's constitutional claims against President Nixon and his aides were based on the theory that they had retaliated against him for speaking out on a matter of public concern.
>
> Our consideration of the immunity issues in both the Nixon case and in Harlow itself assumed that Fitzgerald would be entitled to prevail but for the immunity defenses.
>
> Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in Harlow, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation."

Once their unique reading of Harlow v. Fitzgerald, 457 U.S. 800 (1982) is dissected in regard to the "motive" or

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bearing given the (to them) overwhelming costs of defending against such claims. In this light, Justice Scalia was particularly honest in expressing his general disapproval of § 1983 motive-based constitutional claims, while Chief Justice Rehnquist only hinted at his disapproval through his constant references to such claims as mere 'torts.'"

"discriminatory animus" element, it becomes clear that this argument for certiorari in this case is devoid of any legitimate grounds. As we have explained above, the First Circuit precedents, as well as of the Commonwealth of Puerto Rico, put a reasonable officer on notice that the delay in denying respondent's request of transfer and subsequent resignation without a previous hearing under the circumstances alleged by him was unlawful.[15]

III. RESPONSE TO PETITIONERS' CONTENTION ABOUT SUPREMACY OF PRECEDENTS REGARDING CLEARLY ESTABLISHED LAW AND TO DETERMINE WHETHER DEFERRED ACCEPTANCE OF RESIGNATION WOULD VIOLATE SUCH LAW

Petitioners' discussion in regard to this contention has been thoroughly analyzed by Respondents in Sections I and II, above. We respectfully pray this Honorable Court to accept the above-referred analysis with regard to this third section of the Petition, since Petitioners provide therein no

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[15] See also Practicing Law Institute, 7 LITIGATING SECTION 1983 ACTIONS IN STATE COURTS, PLI Order Number H0-00LA, November 13-14, 2003, at 42:

> "The Court in Crawford-El v. Britton, 118 S. Ct. 1584 (1998) recognized that even under Harlow and its progeny discovery on the issue of motive was not entirely foreclosed. These various protections may not entirely foreclose discovery on the issue of motive, and the Court of Appeals adopted its heightened proof standard in large part to facilitate the resolution of summary judgment motions before any discovery at all. Discovery involving public officials is indeed one of the evils that Harlow aimed to address, but neither that opinion nor subsequent decisions create immunity from all discoveries. Harlow sought to protect officials from the costs of "broad-reaching" discovery, and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity. Id., at 1594 n.14 (citations omitted)."

new grounds to support their contentions as to this third argument, other than, again, inaccurately stating that "[t]he case law of the district of Puerto Rico and the First Circuit does not shed any more light on this subject", which inexplicably ignores, as discussed above, the controlling holding in Nazario Acosta v. Estado Libre Asociado, 2003 TSPR 116, Judgment entered by the Supreme Court of Puerto Rico (without an Opinion) on June 30, 2003, *supra.* Petition, at 26-27.

IV. RESPONSE TO PETITIONERS' CONTENTION ABOUT SUPREMACY OF PRECEDENTS REGARDING THE VIOLATION OF CONSTITUTIONAL LAW AND TO DETERMINE WHETHER DEFERRED ACCEPTANCE OF RESIGNATION WOULD CONSTITUTE A MUNICIPAL LAW, POLICY OR CUSTOM

The petitioners' discussion in regard to this contention cursorily argues that the evidence in the instant case does not establish a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. As to the applicable legal framework, the First Circuit Court's pronouncement in its August 26, 2003 Opinion was entirely correct. Accordingly, we pray this Honorable Court to accept, in addition to the following arguments, the above-referred analysis, since petitioners do not provide any new grounds to support their contentions. See Petition, at 68a-70a.

In essence, Petitioners argue that certiorari should be granted to ensure this Court's qualified immunity precedents by determining whether a Mayor's deferred acceptance of a public employee's letter of voluntary resignation pending a personnel resignation constitutes a municipal policy. There is

no need for this Court to undertake that measure, as the rulings below in no way deviate from this Court's commandments. Worse still, this argument is factually misleading, as the jury in this case established that Mayor Ortiz engaged in political discrimination under color of law.

First, Petitioners blatantly misrepresent the jury's finding. They claim in the Petition that "[t]he verdict rendered on December 9, 2002, imposed liability solely against Mayor Ortiz in his individual capacity." This is a misrepresentation that was explained by the District Court and the First Circuit Court of Appeals, but one that Petitioners insist in trying once again before this Court. A clear reading of the record shows that, in responding to Question No. 1 of the special verdict form, the jury found that "the actions of the defendant [Mayor Ortiz] were under the color of the authority of the state."

The confusion employed by Petitioners to mislead this Court is based on the fact that Question # 9 of the special verdict form inquired whether "the claimed unconstitutional conduct of the mayor as a higher authority was done pursuant to the policy of the municipality of Sabana Grande"; the jury responded to this question in the negative. However, the jury found in the affirmative Question No. 1 on that special verdict form, which asked the jurors to determine whether "the actions of the defendant were under the color of the authority of the state." The confusion stems from the fact that, initially limiting its focus to Question No. 9, the District Court erroneously remarked after hearing the verdict in its entirety that "According to [the special verdict form] the municipality did not have a policy. This thing was basically the mayor's thing. And I will then enter the appropriate judgment [in favor of the municipality]." The District Court then corrected its error by issuing a an order imposing liability as a matter of law, based on the jury's response to Question No. 1, and the First Circuit's decision

in Cordero v. De Jesus-Mendez, 867 F.2d 1 (1st Cir. 1989). Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 103-104 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 68a-69a. The First Circuit Court "aplaud[ed] prompt efforts to cure its initial error."[16] Id. at 69a-70a.

Secondly, the courts below followed this Court's rulings, and no error was committed. Contrary to Petitioners' position, the First Circuit Court below employed correctly its prior holding in Cordero, which implemented the Supreme Court's holding in Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986) that "municipality liability under § 1983 attaches where ... a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." (Emphasis

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[16] The Circuit Court also noted that

> "Significantly, the jury's responses to Question # 1 and Question # 9 did not create an inconsistent verdict to be resolved in accordance with Rule 49 of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 49. The jury's response to Question # 9 reflected its determination that the municipality had no freestanding laws or policies that allowed or encouraged the adverse employment decisions at issue. This determination was in no way inconsistent with its previous finding that the mayor, acting on his own initiative, discriminated against Rivera while discharging his duties as mayor. In the absence of a proper instruction, the jurors were unaware that Ortiz's actions as mayor were themselves the `policy' of the municipality. Given these circumstances, the district court's decision to disregard the jury's response to Question # 9 is in accord with our resolution of the identical problem in Cordero (cites omitted) and did not unfairly prejudice the municipality."

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 70a. Petitioners' present this Court with no reason to review the lower courts' rulings.

added.). In Cordero, the First Circuit found held that a mayor in Puerto Rico is a government official ultimately responsible for the employment decisions of the municipality:

> "Under Puerto Rico law, one of the express powers given to mayors of municipalities is: `To appoint all the officials and employees of the municipal executive branch, and remove them from office whenever necessary for the good of the service, pursuant to the procedures provided herein.' P.R. Laws Ann. tit. 21, ch. 155 § 3002(15) (1980)."

Cordero, 867 F.2d at 7. Hence the conclusion reached by the Circuit Court is correct and unavoidable: "Mayor Ortiz's employment decisions in the context of this case ipso facto `constituted the official policy of the municipality." Id. Therefore, "the liability of the municipality could not be divorced from the mayor's liability in his official capacity. Because the jury expressly found in response to Question # 1 that `the [unlawful] actions of the defendant were under the color of the authority of the state,' municipal liability automatically attached." Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 69a.

Lastly, to support their argument (unsupported by the record evidence or the jury's findings) that the political discrimination was perpetrated by Mayor Ortiz in his official capacity does not impose municipal liability, Petitioner come to this Court with a barrage of factual arguments that are inconsistent with the jury's findings. Such factual arguments have no place before this High Court.

Furthermore, we refer to the compelling First Circuit Court's explanation of the folly of Petitioners' argument:

> "We reiterate that the municipality's contention that `[t]here is no evidence in the record, suggestive of the Mayor implementing any sort of municipal policy,' simply misses the point. Ortiz had the authority to control the conditions of Rivera's employment by virtue of being the Mayor of Sabana Grande. The employment decisions he made in that capacity constituted the policy of the municipality under well-established precedent. (Cites omitted.)

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 70a. This finding by the First Circuit Court is perfectly consistent with Pembaur, 475 U.S. at 483; and Cordero, 867 F.2d at 7. To establish a policy as suggested by Petitioners -- that a municipal mayor can act in his official capacity to discriminate politically in violation of § 1983 without the municipality being liable as long as no formal, written municipal policy is established -- would allow such municipal-government officials to engage in illegal discrimination as long as no formal policy of discrimination is enunciated.

CONCLUSION AND PRAYER

For the reasons stated above, Respondents request the Court to deny Petitioners' Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED, March 2, 2004.

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(4)

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No. 03-898

In the
Supreme Court of the United States

MIGUEL G. ORTIZ-VELEZ and THE MUNICIPALITY OF SABANA GRANDE,
Petitioners,

v.

SANTOS RIVERA-TORRES, DAISY NAZARIO-SANTANA, CONJUGAL PARTNERSHIP RIVERA-NAZARIO, YASIRA RIVERA-NAZARIO and ZAHIRA RIVERA-NAZARIO
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING A PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

On December 22, 2003, Petitioner Mayor of Sabana Grande, Mr. Miguel Ortiz-Velez, in his personal capacity and in his capacity as Mayor, filed a petition for a writ of certiorari to review the decision of the First Circuit Court of Appeals, affirming the denial of qualified immunity and affirming municipal liability. On March 4, 2004, Respondent former-municipal employee and his family members filed their response to the petition and forty-three municipalities of Puerto Rico joined the proceedings by filing an amici curiae brief in support of Petitioners. The latter was opposed by respondents on March 31, 2004 and the response distributed for the Court's April 2, 2004 conference. On April 5, 2004, this Honorable Court denied the petition.

Since the filing of the petition for writ of certiorari, the First Circuit has issued two more opinions that shed light on their qualified immunity holding in the case below, Mihos v. Swift, 358 F.3d 91 (1st Cir. Feb 13, 2004) and Rivera-Jimenez v. Pierluisi, 2004 U.S. App. LEXIS 5773 (1st Cir. Mar. 29, 2004). These two cases highlight the extent to which the First Circuit has deviated from this Court's clear directives by once again inserting bad intent or motive into the qualified immunity analysis to preclude resolution of the immunity issue prior to trial. By relying on the mere assertion that a controversy of fact remains as to Defendants' actual intent to preclude entitlement to qualified immunity, the First Circuit fails to take into account the context within which the Supreme Court has developed the qualified immunity doctrine, namely, that not all controversies of material fact preclude qualified immunity and appellate review of its denial. See Behrens v. Pelletier, 516 U.S. 299, 313 (1996) ("Denial of summary judgment often includes a determination that there are controverted issues of material

fact and Johnson surely does not mean that every such denial of summary judgment is nonappealable"). As is apparent from the two cases discussed below, the First Circuit is not so sure of what Johnson v. Jones, 515 US 304 (1995) means and less so what this Court's decision in Behrens sought to clarify. Because these subsequent decisions have a substantial and controlling effect on the validity of the First Circuit's qualified immunity analysis, we respectfully request that this Honorable Court reconsider its denial of the petition for writ of certiorari.

DISCUSSION

A. MIHOS V. SWIFT

In Mihos v. Swift, Plaintiff was a voting member of the Massachusetts Turnpike Authority who the then-acting Governor removed from the board after the Plaintiff voted against a proposed toll increase. The district court denied the Defendant's motion to dismiss on the basis of qualified immunity and a panel for the First Circuit affirmed. In response to the Defendant's assertion that an official's state of mind is irrelevant to the defense of qualified immunity, the Court stated:

> This argument, along with citations to Harlow, is often made in First Amendment retaliation cases when defendants raise the qualified immunity defense. We are mindful that the Supreme Court in Harlow changed qualified immunity doctrine to emphasize the objective, not subjective, nature of that inquiry. However, Harlow does not stand for the proposition that inquiries into defendants' subjective motivation is inappropriate in the first step of the qualified immunity analysis in assessing whether an intent-based constitutional violation has been alleged.

The panel further acknowledged that the Supreme Court in

Crawford-El v. Britton, 523 US 574, 589 (1998) explained "how Harlow removed the subjective elements from the third step of the qualified immunity inquiry so that 'bare allegations' that the defendant maliciously or knowingly violated plaintiff's constitutional rights would no longer suffice to overcome a qualified immunity defense." However, the Mihos panel went on to distinguish the import of this holding where the question is whether the Plaintiff stated a constitutional claim since procedurally, the case was before the Court on a motion to dismiss.

Although Petitioners believe that the Mihos panel decision did nothing to clarify how a showing of unconstitutional motive in the first prong of the qualified immunity analysis forecloses the assertion of the defense altogether, a subsequent First Circuit decision published just last month obfuscates even further the standards which the First Circuit applies in the First Amendment context.

B. RIVERA-JIMENEZ V. PIERLUISI

While Mihos affirms the denial of qualified immunity at the motion to dismiss stage where the Plaintiff makes out a constitutional claim, the First Circuit panel in Rivera-Jimenez v. Pierluisi applies a qualified immunity analysis that conforms even less to Supreme Court precedent, reaching the same result as Mihos, that immunity is precluded at the summary judgment stage due to a material issue of fact as to Defendant's motive in carrying out the alleged act.

Plaintiffs in Rivera-Jimenez were state investigation agents for the Department of Justice for the Commonwealth of Puerto Rico who claimed retaliatory harassment in the workplace because, allegedly, the results of their investigations indicated corruption within their own agency. Though this decision signals great dangers for government-

employer Defendants in the First Circuit for many reasons, we highlight just two for our present purposes.

As the petitioners briefed earlier, the First Circuit appears to be creating sub-categories of the qualified immunity analyses where the claim alleged is retaliation for First Amendment activity. We inferred this from the conflicting standards applied by the Circuit. Alarming, though not surprising, the Rivera-Jimenez panel declares:

> The standard for showing an adverse employment action is lower in the First Amendment retaliation context than it is in other contexts (such as Title VII), see Power v. Summers, 226 F.3d 815, 820-21 (7th Cir. 2000) , and the Supreme Court has indicated that even relatively minor events might give rise to liability. See Rutan v. Republican Party of Ill., 497 U.S. 62, 75-76 & n.8, 497 U.S. 62 (1990) ; see also Coszalter v. City of Salem, 320 F.3d 968, 974-77 (9th Cir. 2003) ("To constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind."); Power, 226 F.3d at 820 ("Any deprivation under color of law that is likely to deter the exercise of free speech, whether by an employee or anyone else, is actionable..."); but see Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000) (holding that some employment actions are not actionable even though they have the effect of chilling the exercise of free speech).

Contrary to Mihos, Rivera-Jimenez applies the subjective element of Defendants' state of mind beyond the first prong of the qualified immunity analysis and further declares that the unresolved issue as to Defendants' motives precludes not only qualified immunity but divests the appellate court of jurisdiction to even consider the defense. The First Circuit panel states:

> As to the third prong of the qualified immunity determination, the reasonableness inquiry is also a legal determination, although it may entail preliminary factual determinations if there are disputed material facts (which should be left to a jury). In the instant appeal, the lower court determined that questions remained as to the issue of defendants' motive which precluded entry of summary judgment on qualified immunity grounds. Since pre-trial qualified immunity decisions are immediately appealable as collateral orders when the immunity claim presents a legal issue that can be decided without considering the correctness of the plaintiff's version of the facts, we cannot exercise jurisdiction over this part of the qualified immunity analysis. Doing so would entail making a determination of material facts. (internal citations omitted)

Petitioners respectfully believe that parties, attorneys and District Court judges in the First Circuit no longer have any clear guidelines as to the appropriate analysis that will be applied on a pre-trial assertion of qualified immunity. The First Circuit's recent decisions in Mihos and Rivera-Jimenez demonstrate very clearly that a defendant asserting qualified immunity will not prevail on such assertion unless she can also prove that she is entitled to prevail on the merits. The consequences for defendants within the First Circuit are dire in that the merging of the merits of Plaintiff's claim and the merits of Defendant's immunity defense renders superfluous the immunity doctrine, and the policy consideration which underpin it, altogether.

CONCLUSION

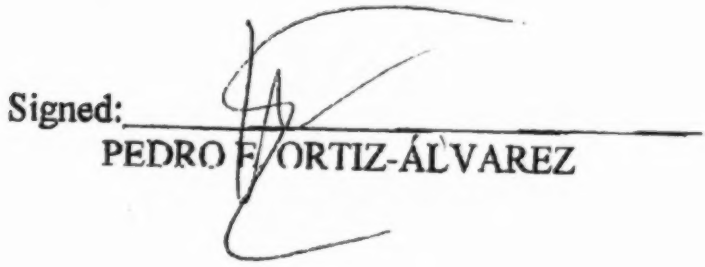
Petitioners are mindful that this Honorable Court restricts petitions for rehearing of an order to deny a petition for writ of certiorari to those circumstances in which intervening events have a substantial or controlling effect on the

disposition of the petition. Petitioners respectfully believe that the First Circuit's insistence on inserting bad motive into the immunity analysis, going so far as making its absence an essential element of a successful immunity claim, affects the substantial rights of petitioners and affirms the fears of the forty-three amici municipalities that qualified immunity has been converted into a doctrine of unqualified liability. We respectfully request that this Honorable Court grant the petition for writ of certiorari in order to review the First Circuit's motive-based application of this Court's qualified immunity doctrine.

PEDRO E. ORTIZ-ÁLVAREZ

Attorney for Petitioners

I, PEDRO E. ORTIZ-ÁLVAREZ, hereby certify on this 30th day of April 2004 that this petition is restricted to intervening circumstances of substantial or controlling effect and is presented in good faith and not for delay.



Signed: _____

PEDRO E. ORTIZ-ÁLVAREZ

(5)

Supreme Court, U.S.
FILED
MAR 4 - 2004
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No. 03-898

IN THE

Supreme Court of the United States

MIGUEL G. ORTIZ VELEZ, MAYOR OF THE MUNICIPALITY OF SABANA GRANDE; MUNICIPALITY OF SABANA GRANDE, PETITIONERS

v.

SANTOS RIVERA-TORRES; DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the First Circuit properly held that the state of mind element of an underlying intent-based constitutional claim merges with the qualified immunity inquiry.

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INTEREST OF THE AMICI CURIAE

The municipal governments of Adjuntas, Carolina, Humacao and Trujillo Alto have a direct interest in the law relating to qualified immunity, particularly the standards at issue in this case. Qualified immunity applies in civil actions against municipal personnel in their individual capacities for money damages under 42 U.S.C. § 1983. The municipalities often represent their government employees in federal civil rights actions and have an interest in protecting such employees from meritless and unduly burdensome litigation. The municipalities also have an interest in ensuring effective deterrence of unconstitutional conduct by government employees, and in ensuring that adequate remedies exist for violations of constitutional rights. For these reasons, amici respectfully submit this brief in support of the Petitioner's petition for writ of *certiorari*.[1]

SUMMARY OF ARGUMENT

In mathematics as in science, it is imperative to identify and understand the nature of the problem one is trying to solve before actually attempting to find its solution. See, e.g., G. Polya, How to Solve It: A New Aspect of Mathematical Method 7-8, 33 (2d ed. 1971). At bottom, the root problem before this Court is the split among the circuits regarding the day-to-day application of the qualified immunity doctrine. Some circuits, including the First Circuit, have disregarded this Court's qualified immunity precedents by imposing a subjective intent element into the qualified immunity doctrine. As we see it, all the other issues raised in this appeal arise out of this fundamental problem.

What, then, is the role "subjective intent" should play in

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[1] Counsel of record has been retained as the authorized law officer for the municipalities of Adjuntas, Carolina, Humacao and Trujillo Alto for the purpose of appearing on their behalf pursuant to Rule 37.4 since amici Municipalities do not employ any law officers admitted to practice before the Supreme Court.

the qualified immunity doctrine? Happily, the answer is as simple and straightforward as can be: subjective intent should play absolutely no role at all.

In Harlow v. Fitzgerald, 457 U.S. 800 (1982), this Court created a single, uniform, across-the-board objective standard for the evaluation and application of the qualified immunity doctrine for *all* qualified immunity cases. Id. at 817 ("bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery"). To be even more precise, this Court "purged" the subjective element altogether from the qualified immunity doctrine. Mitchell v. Forsyth, 472 U.S. 511, 517 (1985).

The First Circuit, however, along with a handful of other circuits have *sua sponte* created a remarkable exception to this Court's uniform objective standard. Specifically, the First Circuit's exception applies to all causes of actions in which the government official's subjective intent is an essential element of the plaintiff's substantive claim (as in the present case). In these types of cases, all bets are off, so to speak, at least in the First Circuit and a few other circuits.

The fundamental problem with the First Circuit's exception—aside from the fact that it disregards this Court's clear and unambiguous precedents establishing a single, uniform objective standard—is that it opens a veritable Pandora's box of troubles. Specifically, the First Circuit's subjective standard departs from this Court's jurisprudence and presents intra-circuit conflicts (see part A below); it creates uncertainty and instability in the day-to-day application of the qualified immunity doctrine (see part B below); it generates a large and artificially high number of civil rights claims (see part C below); and it imposes enormous social costs on municipalities and the public at large (see part D below). Let us examine these various evils in turn.

ARGUMENT

A. THE FIRST CIRCUIT'S SUBJECTIVE STANDARD INCORRECTLY FORECLOSES THE DEFENSE OF QUALIFIED IMMUNITY IN CASES INVOLVING INTENT-BASED CONSTITUTIONAL CLAIMS.

The single most important issue presented in this case is the role that intent plays in the assessment of a public officer's entitlement to qualified immunity. Through its opinion below, the First Circuit was straightforward in its position: any doubt as to the public officer's intent (when motive is an element of the underlying claim) sends the case directly to trial and the defendant cannot avail himself of the qualified immunity shield.

In First Amendment cases such as the one at bar, the plaintiff is required to make a showing that her protected speech was a substantial or motivating factor in the adverse decision challenged. Mt. Healthy City Bd. Of Ed. v. Doyle, 429 U.S. 274 (1977). This burden requires nothing more than a mere showing of improper intent. If at the summary judgment stage the plaintiff fails to establish a triable issue as to her protected conduct being a substantial or motivating factor in the adverse decision, there is no prima facie case and the action is dismissed. This scenario, where Plaintiff fails to meet her prima facie burden as to the state of mind of the Defendant, also happens to be the only scenario in which, according to the First Circuit, qualified immunity would be properly applied.

The first formulation of a conditional immunity can be found in the case of Pierson v. Ray, 386 U.S. 547 (1967), a false arrest case arising out of the enforcement of Jim Crow laws against Black and White ministers attempting to use a segregated bus facility. The Pierson Court was faced with the dilemma that "the common law has never granted police officers an absolute and unqualified immunity, and the officers in this case do not claim that they are entitled to

one". Id. at 555. In assessing that the officers were executing what at the time they believed to be a facially-valid statute and there was probable cause to enforce it, the Court determined that redress under § 1983 was simply not available ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."). Id. at 557.

Reliance on the subjective element of good faith was modified in Wood v. Strickland, 420 U.S. 308 (1975). Wood enounced a bifurcated query with both a subjective (good faith) and an objective (status of the law) element:

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.

Wood, 420 U.S. at 321

After Wood, this Court announced in Harlow the contemporary view of the qualified immunity defense. This Court's new rule (and the policies behind it) could have not been stated more clearly in Harlow. As this case proves, an inquiry into motive becomes a critical issue when courts seek *de brevis* disposition of the issue by way of summary judgment:

> The subjective element of the good-faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may

> not be decided on motions for summary judgment and an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Harlow, 457 U.S. at 816.

Accordingly, this Court instituted a single, objective standard to determine the applicability of qualified immunity. However, the First Circuit in the case below has seen it fit to modify this Court's articulation of the objective test for qualified immunity out of a concern that if an inquiry into motive is not made, government officers would receive a *carte blanche* to disregard civil rights. This concern was not lost upon the Harlow Court: "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct.". Id. at 819. This Court held, however, that the objective inquiry into those particularized rights which are clearly established, a question that has occupied this Court for the twenty years since Harlow, appropriately protects these interests.

This Court's contemporary qualified immunity analysis consists of a three-pronged test. First, the Court must determine whether or not the plaintiff has set forth a constitutional violation. Saucier v. Katz, 533 U.S. 194, 201 (2001). The next two steps require the determination of whether the right asserted was clearly established at the time and whether a similarly-positioned officer would have reacted the same way.

Neither Harlow nor Crawford-El v. Britton, 523 U.S. 574, 588-89 (1998), advocates application of intent to any particular part of the qualified immunity analysis. Under the First Circuit's interpretation of qualified immunity, if the plaintiff has put forth a cognizable constitutional claim for which intent is an element, qualified immunity is denied. This line of reasoning simply perverts the purpose of the first prong. Obviously, for an intent-based constitutional claim, a showing of intentionality is an indispensable issue of fact that requires evidentiary support. Under Saucier, the satisfaction

of the first prong (i.e. the determination that a constitutional violation has been pled[2]), does not mean that qualified immunity is defeated. On the contrary, meeting the first prong triggers the applicability of qualified immunity for immunity is meaningless if there is no underlying violation.

Although petitioners set forth thoroughly the inter-jurisdictional conflicts which exist on the issue of subjective intent, at the time petitioners sought this Court's review the only opinions setting forth the First Circuit's construction of Crawford-El were all written by the Honorable Kermit V. Lipez. See Acevedo-García v. Vera-Monroig, 204 F.3d 1, 7 (1st Cir. 2000); Rivera-Torres v. Vélez-Ortiz, 341 F.3d 86 (1st Cir. 2003). Significantly, although these First Circuit opinions conclude that this Court's decision in Crawford-El requires the rejection of a qualified immunity defense at the pretrial stage of an intent-based claim when motive is contested, neither opinion makes any reference to the majority opinion in Crawford-El, relying only on the dissent of Chief Justice Rehnquist.

Since the submission of the petition for writ of certiorari in this case, the First Circuit has issued two other opinions which attempt to fill the void left by Acevedo-García and Rivera-Torres concerning the reasoning behind their dissent-based construction of Crawford-El. These two recent First Circuit opinions, which deal with First Amendment claims and the application of qualified immunity, expose an intra-circuit split.

In Mihos v. Swift, 2004 U.S. App. LEXIS 2427 (1st Cir. Feb. 13, 2004), the First Circuit, in an opinion authored by Circuit Judge Lipez, reversed a judgment in favor of the former acting Governor of Massachusetts on the grounds that the district court erred in granting a dispositive motion on the basis of qualified immunity after the Plaintiff had satisfied

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[2] On summary judgment, it would have to be determined whether the Plaintiff has established factual issues as to a possible constitutional violation as per Rule 56(c) of the Federal Rules of Civil Procedure

the elements of a First Amendment violation.[3] The First Circuit's general idea of Crawford-El, as stated in Mihos, is that the decision "confirmed that although Harlow eliminated inquiries into the defendant's subjective state of mind in the third step of the qualified immunity analysis, it did not eliminate inquiries into the defendant's subjective state of mind in the first step of the qualified immunity analysis when plaintiff alleges an intent-based constitutional tort." Id. at 32.

The First Circuit's interpretation of this Court's qualified immunity doctrine seems to be a throwback to the beginnings of what we now call qualified immunity. This "good faith" defense to § 1983 claims has consistently evolved to its current incarnation from a defense that was 100% subjective to one that is 100% objective. In its panel opinion in Mihos, the First Circuit attempts to bring back subjectivity to the qualified immunity analysis by unilaterally imposing the limitations set forth in Harlow and Crawford-El to particular portions of the qualified immunity analysis. The panel argues that the removal of the subjective element of intent only affected the third step of the qualified immunity analysis. Id. at 30 ("This "adjustment of the 'good faith' standard" was a reformulation of the third step of the qualified immunity test to eliminate the good-faith, subjective inquiry"). Therefore, the First Circuit reasons, "Harlow, then, did not affect the first step of the qualified immunity analysis: whether plaintiff's allegations, if true, establish a

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[3] The Court stated: "Given the importance of Swift's motivation for firing Mihos for his vote, we must pause to address Swift's argument in her brief that "the state of mind of the public official is not relevant to the question of qualified immunity," citing to Harlow v. Fitzgerald. This argument, along with citations to Harlow, is often made in First Amendment retaliation cases when defendants raise the qualified immunity defense. We are mindful that the Supreme Court in Harlow changed qualified immunity doctrine to emphasize the objective, not subjective, nature of that inquiry. However, Harlow does not stand for the proposition that inquiries into defendants' subjective motivation is inappropriate in the first step of the qualified immunity analysis in assessing whether an intent-based constitutional violation has been alleged." Mihos at 26-27.

constitutional violation." Id.

The First Circuit itself is obviously split as to this issue. In Fabiano v. Hopkins, 352 F.3d 447 (1st Cir. Dec. 9, 2003), a different panel of First Circuit judges[4] applied a qualified immunity standard which conforms to this Court's jurisprudence and departs sharply from the approach taken later in Mihos. Ironically, in Fabiano the District Court dismissed the case on the merits. See Fabiano v. Hopkins, 245 F. Supp. 2d 305 (D. Mass 2003). The court of appeals, *sua sponte*, affirmed on qualified immunity grounds. The Fabiano court engaged in a thorough examination concerning the first prong of the qualified immunity analysis (i.e. whether plaintiff had set forth a cognizable First Amendment claim) and, citing Mt. Healthy City Sch. Dist. Bd. of Educ., found: "In the third and final step in establishing a First Amendment violation, Fabiano must show that his protected speech was a substantial or motivating factor in the City's decision to fire him. **This requirement is satisfied**." Fabiano, 352 F.3d at 457 (Citations omitted; emphasis ours)

In contrast with the Mihos mandate (to deny qualified immunity upon a factual dispute as to improper motive), the Fabiano court proceeded to state that "having concluded that Fabiano's allegations arguably suffice to state a First Amendment claim, we proceed to the second step of the qualified immunity analysis and consider whether Fabiano's First Amendment right was "clearly established.". Ultimately, the right asserted by Fabiano was found to be abstract enough for a reasonably objective officer to conclude that her actions were in violation of clearly established law. This is the way a qualified immunity claim should be assessed.

For all purposes, the First Circuit has eliminated the qualified immunity defense from intent-based claims. Their

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[4] Mihos was decided by a panel comprised of Judges Lipez, Torruella and Schwarzer (of the Northern District of California); Fabiano was decided by Judge Howard and Senior Judges Stahl and Campbell.

interpretation that intent is still a relevant part of the first prong of the qualified immunity analysis, even if accepted, does nothing to compel the foreclosure of qualified immunity where intent is a contested element of the underlying claim. Accordingly, writ should issue to clarify this issue.

B. THE FIRST CIRCUIT'S SUBJECTIVE STANDARD PRODUCES UNCERTAINTY AND INCONSISTENCY IN THE ADJUDICATION OF CIVIL RIGHTS CLAIMS

In the first day of law school, most students are taught that the underlying goal of the law is to promote the values of consistency and predictability. See, e.g., Holmes, "The Path of the Law", 10 Harv. L. Rev. 457, 461 ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."). For the reasons described below, however, the subjective test sabotages this central and paramount goal of the law by mischievously subverting this Court's single, uniform objective standard.

First, from a pragmatic evidentiary point of view, it is practically impossible to actually prove a person's, any person's, subjective intent. As this Court itself duly noted in Crawford-El "an official's state of mind is easy to allege and hard to disprove." Id. at 584-85 (citation and internal quotation marks omitted). The probative difficulties are, frankly speaking, insurmountable. How do we know what the mayor in the present case, or any government official in any other case, was really thinking when he made *x* decision? A wide variety of possible motives may have crossed his mind at the time. How, then, do we determine which of the possible subjective motives was *the* motive that won out over all the others?

Second, the evidentiary difficulties described above increase litigation costs and promote the inefficient use of scarce judicial resources. To illustrate this point, one need only turn to Crawford-El. In Crawford-El, the plaintiff, a

convict serving a life sentence for murder, brought a First Amendment retaliation action against a prison official for allowing his boxes of personal belongings to be retrieved by his brother-in-law when the plaintiff was transferred to another prison. This seemingly innocent and simple question at the heart of Crawford-El resulted in a judicial quagmire of enormous proportions (a full *en banc* hearing by the court of appeals and review by this Court) consuming close to 100 pages of the Federal Reporter and U.S. Reports. Yet, despite the massive amount of judicial resources devoted to the Crawford-El litigation, we still don't know what really motivated the defendant's alleged retaliation against the plaintiff (i.e. the withholding of the infamous boxes).

Or take the present case. The plaintiff, a chronic absentee who missed over 60 days of work during a five-month period, brought a "political discrimination" action against his employer because the employer did not accept his letter of resignation by a specified date. Worst of all, the plaintiff had submitted his letter of resignation in an underhanded effort to avoid being disciplined for his chronic absenteeism. Who would have thought that under the First Circuit's subjective intent standard, the First Amendment now effectively protects a plaintiff's pathological absenteeism?

Third, the First Circuit's purported "exception" in reality threatens to swallow up the general rule of a single, uniform objective standard. We dare say that most members of the plaintiff's bar are clever enough (and, perhaps, cunning enough) to draft a complaint to fit the First Circuit's exception, converting the government official's intent (as opposed to his actions) as the basis of plaintiff's constitutional claim. In essence, the subjective test has the mischievous potential of converting literally every action taken by every government official into a constitutional violation. As Judge Silberman bluntly puts it in his concurring opinion in connection with the Crawford-El litigation, "virtually any ostensibly legal action taken by a government official can be thought unconstitutional if

prompted by an unconstitutional motive." Crawford-El v. Britton, 93 F.3d 813, 833 (D.C. Cir. 1996) (Silberman, J., concurring). That is, the same action, the same set of facts, can produce inconsistent results under the subjective standard, depending on the subjective intent of the government actor.

Fourth, the First Circuit's purported distinction between "thoughts" and "actions" does not hold much water, if any, at the end of the day. Although this is at bottom a deep and intractable philosophical question going back to Descartes, it is not unreasonable to say that all action is preceded by thought. Indeed, all action requires thought. Take the following simple example. Mr. X drinks a glass of water (a simple and straightforward action). But in order for Mr. X's hand to pick up the glass, his mind must have sent a command to his hand, ordering the hand to pick up the glass. And for his mind to send this command, Mr. X must have thought about the action of picking up the glass before he actually did so.

The simple act of picking up a glass of water can generate an inordinate amount of controversy under the First Circuit's subjective test. Applying the subjective standard, we must enter Mr. X's thought-processes and we are forced to ask why, then, did Mr. X pick up the glass of water? Was he simply thirsty? In fact, there are many other possible motives as well. Maybe he was motivated primarily for health reasons. That is, Mr. X really prefers bourbon, but his doctor told him to drink water instead. Or maybe he simply wanted to wash down some food he just ate. Perhaps he just wanted to cool down a bit, or clear his taste buds before drinking a cup of espresso. The length of our list of possible motives is limited only by our and this Court's imagination. But one is tempted to reply that Mr. X's motivation is perfectly obvious. And, yes, it is obvious, so long as we use an *objective* standard, that is, so long as we just look at the circumstances surrounding his action of picking up the glass of water.

The above example is precisely why this Court and the

law generally use an *objective* standard to evaluate the actions of an actor: we look to objective circumstances surrounding a given action, not the actor's subjective intent. Indeed, the use of subjective standards of liability is utterly inconsistent with the larger principles of our legal landscape. No less an authority than Oliver Wendell Holmes pointed out to us long ago that the general movement of the law, in such diverse areas as torts, contracts, and crimes, was from a subjective theory of liability to an objective one. Holmes explained that "the law's indifference to a man's particular temperament" was the most efficient way of adjudicating disputes and deterring harms. See O.W. Holmes, The Common Law 41 (M. Howe ed. 1963).

C. THE SUBJECTIVE STANDARD HELPS PRODUCE TOO MUCH FEDERAL LITIGATION

Mayors and other local government officials from the Commonwealth of Puerto Rico have repeatedly observed how the lower federal courts in Puerto Rico have used the First Circuit's subjective standard to defeat otherwise valid immunity claims under the objective standard, resulting in a huge increase in civil rights litigation (especially employment discrimination). Rather than offer anecdotal evidence to support this contention, and rather than limit our analysis to the woes of local governments in the Commonwealth of Puerto Rico, we shall extend our scope to the entire United States, reporting the actual raw data compiled by the Bureau of Justice Statistics of the U.S. Department of Justice, to give this Court some idea of the massive scale of the problem.

In 1961, the year this Court decided Monroe v. Pape, 365 U.S. 167 (1961) (dramatically expanding the scope and reach of 42 U.S.C. § 1983), only 296 civil rights actions against government officials were filed in all the lower federal courts. See, e.g., Eisenberg & Schwab, "The Reality of Constitutional Tort Litigation", 72 Cornell L. Rev. 641, 667 (1987). By 1990, the floodgates had been effectively opened, for the number of filings had expanded exponentially into

over 18,000. See Bureau of Justice Statistics, "Civil Rights Complaints in U.S. District Courts, 1990-98" (released January 2000). Another way for this Court to appreciate the spectacular growth of civil rights (especially employment discrimination) litigation in the lower federal courts is to express the raw numbers in terms of percentages. For example, the percentage growth of such filings between 1960 and 1983 was 7,350%, and between 1983 and 1995 it was 59%. See R. Posner, The Federal Courts: Challenge and Reform 100-101 (Table 4.2) (rev. ed. 1996) (Judge Posner's figures are based on the annual reports of the Director of the Administrative Office of the United States Courts). The former figure (7,350%) is admittedly very high because we are starting with a near zero baseline, but even the latter figure (59%) is significant when one considers that the average growth rate in all categories of cases filed between 1983 and 1995 was only 15.5%. Id.

The relevant statistics compiled by the Bureau of Justice Statistics of the U.S. Department of Justice confirm that this upward spiral of civil rights litigation has now apparently leveled off. In 2000, plaintiffs filed 40,098 civil-rights related complaints (after reaching an all-time high of 43,278 in 1997). See Bureau of Justice Statistics, "Civil Justice Data Brief: Civil Rights Complaints in U.S. Districts Courts, 2000" (released July 2002). Nevertheless, 41,000 is still a large number, representing approximately 15% of all civil cases filed in the lower federal courts. Furthermore, civil rights-related appeals accounted for about 22% of all civil cases filed in U.S. courts of appeals during the year 2000. Id. When one considers that the legal defense of a civil rights claim can cost from $50,000 to $250,000, one must conclude that the number of case filings has reached alarming proportions.

Of course, we understand that a country with a population as large and diverse and litigious as the United States is bound to generate an increasing amount of litigation in all categories. See, e.g., A. de Tocqueville, Democracy in

America 89-95 (J.P. Mayer & M. Lerner, eds., 1966). Nevertheless, we bring these damning statistics to the attention of this Court to demonstrate the significance of the main issue underlying this appeal for it appears that it has been the use of the subjective qualified immunity standard that has, in large measure, led to the unprecedented expansion of civil rights and employment discrimination claims. Simply put, in the absence of this subjective standard, many if not most of the civil rights claims being litigated today would not survive the summary judgment stage. In addition, the application of the subjective test imposes enormous social costs on local governments and, ultimately, on the public at large, as we shall explain below.

D. THE SUBJECTIVE STANDARD IS AN INEFFICIENT METHOD FOR DETERRING CONSTITUTIONAL WRONGS

Before we proceed, we wish to point out that this Court's single, uniform, and across-the-board qualified immunity doctrine (however imperfect it may seem to a handful of circuits and to the plaintiff's bar) is an attempt to balance a number of legitimate and competing goals, such as deterrence of constitutional violations, compensation to victims, and reduction of social and administrative costs.

The competing goals served by the qualified immunity doctrine are in many ways similar to the goals of tort law itself, and one of the main lessons of the economic analysis of tort law is that an efficient tort system is one that imparts the proper incentives to both potential victims and potential injurers, to both consumers and firms. See G. Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); W. Landes & R. Posner, The Economic Structure of Tort Law (1987). The same principle is true in the realm of constitutional torts. Civil rights law in general, and the qualified immunity doctrine in particular, should impart proper incentives to public employees and to government officials. See P. Schuck, Suing Government (1983).

Specifically, civil rights law should deter government officials from violating the constitutional rights of their public employees, but at the same time, civil rights law should not induce paralysis in day-to-day governmental decision-making. In short, civil rights law, like tort law generally, should strike the appropriate balance between underdeterrence and overdeterrence. Id. at 68-75.

It would be wise to remember that the resources of local governments--and those of the federal courts, who after all, must process civil rights claims—are limited. Yet, the expansion of municipal civil rights liability through the First Circuit's winnowing of qualified immunity has imposed huge direct costs on Puerto Rico's municipalities. These direct costs of liability act, in effect, as a tax on the production of public services.

To get some sense of these direct costs and the seriousness of the incentive problem, we need only look to the present case. The district court eventually awarded the plaintiff and his family a total of $536,400 in compensatory and punitive damages. See Rivera-Torres v. Ortiz, 341 F.3d 86 (1st Cir. 2003). Putting aside for the moment the possible incentive effects an award of over half a million dollars may have on other public employees, we consider the direct cost of the award to the Municipality of Sabana Grande (plaintiff's employer) and to the public at large. The Municipality of Sabana Grande's annual budget for fiscal year 1999-2000 was $5,544,086. See Puerto Rico Office of Comptroller, "Comptroller Annual Report for the Municipality of Sabana Grande" 4 (released Jan. 30, 2003). Put another way, plaintiff's award represents close to ten percent (.096) of the municipality's annual budget for 1999-2000. That is, roughly ten cents out of every dollar in the municipality's revenue stream represents a wealth transfer to the plaintiff.

The direct costs of civil rights (especially employment discrimination) claims filed against all Puerto Rico municipalities are staggering. According to the Puerto Rico

Office of Comptroller, no less than 27 of Puerto Rico's 78 municipalities, or roughly one-third (.346) of all municipalities, were required to pay out damages, or had pending judgments entered against them, arising out of employment discrimination claims, and the aggregate cost of these payouts and pending judgments was over $27 million. See Puerto Rico Office of Comptroller, "Special Report M-04-22," pp. 26-29 (released Dec. 5, 2003).

What is even more breathtakingly staggering is the potential liability of Puerto Rico's municipalities for all pending employment discrimination claims. According to the Puerto Rico Office of Comptroller, 67 of Puerto Rico's 78 municipalities face a potential liability of more than $1.7 billion. Id. at 33-37 (the exact figure is $1,723,717,702). When these liability statistics for Puerto Rico alone are seen in the aggregate, it becomes clear that the expansion of civil rights liability (and the shrinkage of qualified immunity due to the First Circuit's subjective standard) must be creating perverse incentive effects and rent-seeking behavior[5]. See, e.g., Rosenberg & Shavell, A Model in which Suits Are Brought for Their Nuisance Value, 5 Int'l Rev. of Law & Econ. 3-13 (1985). Who ultimately pays these direct costs?

The ultimate victim of the First Circuit's subjective standard is not the mayors and other local government officials of the Commonwealth of Puerto Rico who must now get bogged down in the intricacies of the discovery process and the rigors of lengthy federal trials; the ultimate victim is the public at large, who must bear the direct costs described above through a reduction in the quantity and quality of public services. The *quantity* of public services is reduced because local governments must now devote an ever-

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[5] 'Rent-Seeking Behavior,' a term coined by economist Gordon Tullock, describes the expenditure of resources in order to bring about an uncompensated transfer of goods or services from another person or persons to one's self as the result of a 'favorable' decision on some public policy. See, e.g., James M. Buchanan, Robert D. Tollison, & Gordon Tullock, eds., Toward a Theory of Rent-Seeking Society (1980).

increasing share of their revenues to subsidize the direct costs of civil rights litigation. At the same time, the *quality* of public services is lowered because mayors will think twice before firing or otherwise disciplining lazy, corrupt, or otherwise inefficient public employees, especially if a particular employee belongs to the opposing political party. In fact, it may be cheaper for a mayor to not fire an inefficient employee, because the cost to the municipality of the employee's salary may be less than the expected value of the risk of incurring a potential damage award. See Schuck, *supra*, at 59-81.

The overall reduction, then, in both the quantity and quality of public services represents an additional social cost this Court should consider. A municipality's capacity to respond to local needs, to experiment to solve local problems, and to provide essential public services to the public could be severely restricted if excessive damage awards are imposed on it or if the law governing municipal liability is unclear or inconsistently applied.

There are about 87,900 local government units, including 19,341 municipal governments, in the United States as of June 30, 2002. See U.S. Census Bureau, "Government Units in 2002" (Charts A and B) (released July 2002). Municipalities and other local government entities in the Commonwealth of Puerto Rico and the United States provide a wide variety of essential public services, including fire protection, water supply, housing, sewerage, cemeteries, libraries, parks, roads, hospitals, education, and airports. See U.S. Census Bureau, "Special District Governments by Function: 2002" (Table D) and "Distribution of Special District Governments by Function: 2002" (Chart C). No less a figure than Alexis de Tocqueville commented on the important role municipalities and townships play in the daily life of the American people. See de Toqueville, *supra*, at 54-72.

Many of the essential public services provided by local governments—such as hospitals, libraries, schools,

cemeteries, parks—benefit especially the poor. For example, the annual median household income in the Commonwealth of Puerto Rico in 1989 was less than $9,000. See U.S. Census Bureau, "Report on Puerto Rico, Social and Economic Characteristics: 1990" (Table 77). Many of our citizens rely on the essential public services provided at the municipal and local government level. But if civil rights law generally and the qualified immunity doctrine in particular produce excessive claims and social costs, resulting in the overdeterrence of government action, the ultimate victims are the most vulnerable and disadvantaged of our citizens.

Furthermore, local governments generally have a much smaller and narrower tax base and do not have the variety of tools that federal and state officials have for raising revenues. For example, in the Commonwealth of Puerto Rico, municipalities receive a large fraction of their revenues from the imposition of a special business tax (the *patente municipal*) on firms within their jurisdictions. Thus, many of Puerto Rico's small and geographically-isolated municipalities, such as Sabana Grande, confront significant constraints for raising additional revenues. The Municipality of Sabana Grande is a case in point. There were only 64 business establishments (i.e. firms with payroll) within Sabana Grande's jurisdiction as of 1992. See U.S. Census Bureau, "Kind of Business Groups for [Puerto Rico] Municipios: 1992" (Table 6).

One final point. The First Circuit's subjective standard purports to do justice to public employees who feel they are the victims of a constitutional violation by giving them their day in court. But in reality, the subjective standard may do more harm to public employees in the aggregate than good. For we must also consider what effect on new hires it may have. The overdeterrence effects of the subjective standard may be so great that mayors will think twice before hiring someone they do not personally know. Ironically, such an outcome would perpetuate the problems of cronyism and nepotism that plague many local governments.

CONCLUSION

The *amici* municipalities are not proposing that this Court turn "back the clock" on civil rights. We only ask the Court to consider the unforeseen consequences of the First Circuit's subjective qualified immunity standard. The hidden but measurable consequences of a qualified immunity doctrine that results in almost unqualified liability include the impositions of enormous social costs on the public at large, the promotion of inefficient rent-seeking behavior, and the consumption of scarce judicial resources. Government employers, government employees and citizens who are the beneficiaries of the services provided by the local government all benefit from a clearly articulated and objective standard for constitutional conduct.

Respectfully submitted,

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In The

Supreme Court of the United States

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande, MUNICIPALITY OF SABANA GRANDE,
Petitioners,

v.

SANTOS RIVERA-TORRES, DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR,
Respondents,

On opposition for a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY IN OPPOSITION TO AMICI CURIAE PETITION IN SUPPORT OF PETITIONER

From the Federal District Court of San Juan, Puerto Rico No. 01-1244 (JAF) and First Circuit Court of Appeals No. 02-2539; 03-1074

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March 31st, 2004

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Respondents,

On opposition for a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY IN OPPOSITION TO AMICI CURIAE PETITION IN SUPPORT OF PETITIONER

From the Federal District Court of San Juan, Puerto Rico No. 01-1244 (JAF) and First Circuit Court of Appeals No. 02-2539; 03-1074

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QUESTION PRESENTED

Whether the First Circuit properly held the state of mind element of an underlying intent-based constitutional claim merges with the qualified immunity inquiry.

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INTRODUCTION

On March 4th 2004 Mr. Frank Guerra and Mr. Carlos del Valle filed a Brief of Amicus Curiae In Support of Petitioner representing several municipalities of Puerto Rico.

Respondent wish to supplement Opposition to the Petition for the Writ of Certiorari and to address the Amicus Curiae arguments according to Rule 15.8 of the US Supreme Court.

The jury below found that Petitioners engaged in flagrant political discrimination against Respondent Santos Rivera Torres, and the First Circuit Court of Appeals affirmed that verdict. No errors were committed by the courts below, and the jury's findings are not attacked in the Petition for a Writ of Certiorari or Brief by the Amicus Curiae. As we discussed in the Reply Brief, the legal contentions in that Petition are wholly without merit, and not such writ should be granted.

Before delving exclusively[1] into the Amicus Curiae's main arguments, it should be noted that, hidden underneath Petitioners' certiorari request to this Court, is their counsel's attempt to cover-up their faults during the trial proceedings as described in the Respondent's Reply Brief.[2]

The Amicus Curiae present a biased, self serving and interested party where Brother Attorneys represent

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[1] Respondent request that the Reply Brief filed on March 2nd 2004 be considered as part of this Supplemental Brief.

[2] Petitioners also tried to cover-up each attempt to justify the deceitful termination of a 20-year-career municipal employee without due process, because such attempts backfired before the jury.

municipalities that have been sued in the Federal Court after the largest and biggest political generalized and institutionalized campaign to persecute, demonize, discriminate and violate the basic and fundamental constitutional rights against any person who is Pro-American in Puerto Rico by the Colonialist and Anti-American Popular Party. Amicus Curiae they are not, they are friends of only one party in this case.

On the appeal to the First Circuit or in the original Petition for Certiorari, Petitioners does not attacked the Jury findings but pretend their "friends" after four Appeals to the First Circuit re-litigate the factual evidence of this case. Those four appeals are 04-1220, 03-1761, 03-1074 and 02-2539

The Amicus Curiae is a parallel instrument used by Petitioners as a dilatory tactic for frivolous petitions to clearly abuse the judicial process.

In the *Brief of Amicus Curiae in Support of Petitioner*, page 6, 3rd paragraph, it is argued that "[s]ince the submission of the petition for writ of certiorari in this case, the First Circuit has issued two other opinions which attempt to fill the 'void' left by Acevedo-Garcia and Rivera-Torres concerning the reasoning behind their dissent based construction of Crawford-El. These two recent First Circuit opinions, which deal with First Amendment claims and **the application of qualified immunity, expose an intra circuit split.**" (Emphasis added)

Just a cursory glance of both opinions is needed to conclude that the Amicus Curiae either neglected to read carefully the aforementioned opinions or simply did not get their holdings. First of all, **there is no circuit split at all that can be ascertained from those opinions.** Neither Harlow nor Crawford-El is even mentioned in Fabiano v. Hopkins, 352 F.3d 447 (1st Cir. 2004). Moreover, Mihos v. Swift, 358

F.3d 91 (1st Cir. 2004) and Fabiano follow step by step the same old and traditional qualified immunity analysis where in the first step, in assessing **whether the facts as alleged make out a constitutional violation** the Fabiano court determined:

> "In the third and final step in establishing a First Amendment violation, **Fabiano must show that his protected speech was a substantial or motivating factor in the City's decision to fire him.** See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Mullin, 284 F.3d at 38. **This requirement is satisfied. Hopkins was holding a copy of the Zoning Board complaint in her hand when she fired Fabiano, and in her affidavit below she cited the lawsuit as one of several reasons underlying the termination (although she took pains to emphasize that the method by which Fabiano sued the City, not the suit itself, was the cause).** It may well be that a fact finder would determine that Fabiano's deficiencies in professional judgment, not the lawsuit itself, was the primary cause of the firing. But, taking all inferences in favor of Fabiano, as we are bound to do, **we conclude that he has adduced sufficient evidence of causation for purposes of our review.**" Fabiano v. Hopkins, supra at 457. (Emphasis added)

Admittedly, it was at the second step of the qualified immunity analysis, in assessing **whether that right was clearly established**, that the Fabiano court deemed applicable the defense:

> **"The facts of this case do not present the sort of unusual circumstances that would support the finding of a clearly established right**

> notwithstanding Pickering. As we noted supra, there is a very close question as to whether Fabiano's allegations made out a constitutional claim. Fabiano's supervisors had, on at least one formal occasion, stated a basis for distrusting his judgment, see Dirrane, 315 F.3d at 71, and were reasonably concerned about the potential conflict of interest (and the appearance of such conflict) that his Zoning Board lawsuit entailed. **We cannot say that they knew or should have known that firing Fabiano under these circumstances was unlawful.** Accordingly, we conclude that Joyce and Hopkins are entitled to qualified immunity on Fabiano's First Amendment claims." Fabiano v. Hopkins, at 457-458. (Emphasis added)

Consequently, there is no "contrast" between the Mihos and the Fabiano opinions, as **both of them take into consideration the "motivating factor" during the first step of the qualified immunity analysis.** The different results reached at the end are irrelevant to the criteria used during the analysis.

Just as a cursory glance of both opinions is needed to conclude that the Amicus Curiae either neglected to read carefully the aforementioned opinions or simply did not get their holdings, the rest of the *Brief of Amicus Curiae in Support of Petitioner* deserves the same characterization inasmuch as it disrespectfully argues that "the plaintiff had submitted his letter of resignation in an underhanded effort to avoid being disciplined for his chronic absenteeism. Who would have thought that under the First Circuit's subjective intent standard, the First Amendment now effectively protects a plaintiff's **pathological absenteeism**?" *id.* at page 10, 2nd paragraph. **The jury has already settled who the pathological liar is in this case.** In any event, petitioners

requested from respondent's physician his medical records and the physician answered several days afterward -in early July of 2000- in spite of petitioner's allegation that the letter was "received" on October 31st 2000. In the meantime -in September 20, 2000- the Mayor had publicly said in a radio broadcast that respondent was a crook and it was not until November 13th 2000, when the Mayor accepted his resignation –five (5) months after the 15-day term provided by the regulations. Accordingly, the "fair and clear warning" that those cases provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage. Hope v. Pelzer, 536 US 730, 746 (2002).

CONCLUSION AND PRAYER

For the reasons stated above, Respondents request the Court to deny Petitioners' Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED, March 31st 2004.

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